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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

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TEXAS. — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**.

UTAH. — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **73**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**.

WYOMING. — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**.

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(15)

CASES

IN THE

SUPREME COURT

OF

GEORGIA.

KNIGHT v. STATE.

[114 Ga. 48, 39 S. E. 928.]

EVIDENCE.—A CONVERSATION BETWEEN A HUSBAND AND WIFE, though intended to be confidential, may be proved by one who overhears it. (p. 18.)

EVIDENCE.—AN ADMISSION OF AN INCRIMINATING NATURE BY A HUSBAND to his wife in response to something said by her to him may be testified to by any stranger who overhears the conversation. (p. 18.)

EVIDENCE—DECLARATION.—If, under the evidence, it is uncertain whether a declaration was made in the hearing of the accused, it is not error to allow proof of the declaration and instruct the jury to disregard it if they believe the accused did not hear it. (p. 19.)

A WITNESS SOUGHT TO BE IMPEACHED by evidence of contradictory statements cannot be supported by testimony that he made statements elsewhere in harmony with his testimony. (p. 19.)

AN INSTRUCTION ON THE LAW OF ALIBI, though there is no occasion for it, is not ground for a new trial, if the accused is not thereby prejudiced. (p. 19.)

JURY TRIAL.—AN INSTRUCTION ON THE LAW OF CONFESSIONS should be refused if there is no proof of any confession. (p. 20.)

IMPEACHMENT OF WITNESS.—In the absence of a special request, the court need not apply to testimony discrediting particular witnesses the rules of law which have been given with reference to the impeachment of witnesses generally. (p. 20.)

JURY TRIAL.—AN INSTRUCTION ON THE LAW OF MANSLAUGHTER is properly refused, if the evidence discloses that the accused is guilty of no less a crime than murder. (p. 20.)

JURY TRIAL.—IN CHARGING THE JURY ON A STATEMENT OF THE ACCUSED, the court should not say "that statement is in no sense binding upon you"; but, if he does, this is not ground for a new trial, if it appears that they understand how they are authorized by law to use the statement. (p. 21.)

W. S. Howell, Allen & Tisenger, and McLaughlin & Jones, for the plaintiff in error.

J. M. Terrell, attorney general, T. A. Atkinson, solicitor general, and J. R. Terrell, contra.

[49] LUMPKIN, P. J. The plaintiff in error was convicted of the murder of Sol. Owens, made a motion for a new trial, and excepted to the overruling thereof. It was insisted in behalf of the accused that the killing, which was done with a pistol, was not his act but that of one Alex. Finley.

1. The court admitted, over the objection of counsel for the accused, the testimony of certain witnesses to the effect that the wife of the accused said to him, shortly after the killing, "You have shot big Bud" (meaning the deceased), to which he replied, "He wasn't hurt much." This testimony was objected to on the ground that it related to a confidential communication betweeen husband and wife, and that her sayings were not admissible against him. It is true that the Civil Code, section 5198, declares: "There are certain admissions and communications excluded from public policy," and, among them, "communications between husband and wife." But the meaning of this provision simply is that neither of the married pair will be permitted to testify as a witness concerning such communications, or to furnish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. This section of our code was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the same. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider. See, in this connection, 19 Am. & Eng. Ency. of Law, 154; 1 Wharton on Evidence, 3d ed., sec. 427; 1 Greenleaf on Evidence, 16th ed., sec. 254, p. 392. The wife was not, in [50] the present instance, competent to testify for or against her husband: Pen. Code, sec. 1011, par. 4. But an admission of an incriminating nature made by the husband to and in the presence of the wife, in response to something said by her to him, was certainly relevant, and any stranger who overheard the conversation was competent to testify in regard thereto. She charged him with the commission of the homicide; and his reply, "He wasn't hurt much," is susceptible of the construction that he

practically admitted the shooting. What she said was clearly relevant, as tending to explain the meaning of his response thereto.

2. Error is assigned upon the refusal of the court to rule out the testimony of a witness that, "immediately after the pistol fired, Sol. Owens asked, 'Who in the hell was that shot me?' and Will Strahan spoke and says that it was Enos Knight shot." A review of all the evidence in the case leaves it uncertain whether the remark of Strahan was or was not made in the hearing of the accused, though the jury might properly have inferred that he heard it. With regard to this matter the court instructed the jury that unless they believed the accused did hear what Strahan said, they should not consider the testimony above mentioned. We cannot, therefore, see that any injury to the accused resulted; and moreover, the exclamation of Strahan was, apparently, admissible as a part of the res gestae of the homicide.

3. During the progress of the trial the state undertook to discredit the testimony of one Lee Dixon by showing that he had made statements contradictory to what he testified to on the stand. The defense sought to support this witness by proof that he had made statements elsewhere which were in harmony with this testimony. The court was clearly right in refusing to allow this to be done.

4. A correct charge on the law of alibi was given by the judge. The complaint is made, however, that there was no evidence calling for such a charge, and that the accused did not set up alibi as one of his defenses. The record discloses that there was some testimony tending to show that at the time the fatal shot was fired the accused was twenty-five or more yards distant from the exact spot where the shooting took place. This was, we think, hardly sufficient to warrant a charge on the subject of alibi, but we fail to perceive how the giving of the instruction complained of could have operated to the prejudice of the accused. The main and controlling [51] issue in the case was whether or not he or Alex. Finley fired the fatal shot. At least four witnesses testified positively that the shooting was done by the accused, and a number of witnesses introduced in his behalf testified it was done by Finley. The jury evidently believed the witnesses for the state, and we have no reason to fear that in reaching this conclusion the jury was misled or improperly influenced by the charge of the court upon the law of alibi.

5. Error is assigned upon the failure of the court to charge as follows: "All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession uncorroborated by other evidence will not justify a conviction." There was no evidence of any confession; none, indeed, of an incriminating admission, save the reply of the accused to the charge made against him by his wife, commented upon above. If, therefore, the judge had given such a charge as that quoted, he would have committed grave error, and doubtless counsel for the plaintiff in error would be here complaining of the same.

6. The brief of evidence discloses that the accused made an effort to impeach certain witnesses testifying against him, and that the state offered testimony with a view to discrediting other witnesses introduced in his behalf. The presiding judge, in his charge to the jury, correctly stated to them the law with reference to the impeachment of witnesses. Complaint is made that the court did not, of its own motion, go further and expressly caution the jury not to consider evidence introduced by the state to impeach one William Dixon, a witness for the accused, for any purpose other than to determine "what credit his evidence was entitled to." A similar complaint is made with reference to the failure of the court to charge concerning certain evidence offered on the part of the state to impeach another witness testifying in behalf of the accused. Clearly, it was not incumbent upon the court, in the absence of a special request, to undertake to apply to the testimony going to the discredit of these particular witnesses the rules of law which had been given with reference to the impeachment of witnesses generally. Doubtless, if a request so to do had been presented, it would have received proper attention.

7. It is further insisted that "the court erred in not charging the law of voluntary manslaughter and the different grades of manslaughter." A careful examination of the brief of evidence discloses [52] that the person who actually committed the homicide was guilty of no less a crime than that of murder. Indeed, there was in proof not the slightest circumstance upon which a jury could properly base a finding of manslaughter, voluntary or involuntary.

8. Exception is taken to the following charge of the court: "The defendant denies in this case that he killed Sol. Owens.

In support, gentlemen, of his defense, he has submitted to you, under the permission of the law, a statement which is not under oath, and that statement is in no sense binding upon you. The law declares you may deal with his statement as you, the jury, see proper, as you think right. You are authorized, gentlemen, to believe the entire statement of the defendant, if you think it is right; or, on the other hand, you are authorized to totally disbelieve every word of it, if you think that is right. You may believe one part of his statement and disbelieve the other part, if you think that is the right way to deal with it; and you may believe the statement of the defendant in preference to the sworn testimony, if you think that is right." One expression only in this charge is alleged to be erroneous, to wit, "that statement is in no sense binding upon you." While we do not think this expression should have been used, we cannot agree with counsel that its effect was to "practically withdraw from the jury the consideration" of the prisoner's statement. Evidently, the judge only meant, and the jury must have understood, that this statement was not binding upon them in the sense that they were obliged to base their finding upon it. They were distinctly informed that they were at liberty to believe the whole or any part of it, if they saw proper, "in preference to the sworn testimony"; and we entertain no doubt that they fully understood how they were authorized by law to regard it. Nevertheless, we take this occasion to repeat that it would be better practice if our brethren of the trial bench, in charging upon this subject, would confine themselves to the language of the statute with reference thereto.

9. We have dealt with all of the grounds of the motion for a new trial which are verified by the judge's certificate, save only the general grounds and certain others predicated upon newly discovered evidence. In view of the fact, mentioned above, that at least four witnesses testified they saw the accused fire the fatal shot, the conclusion reached by the jury that he was the person who committed [53] the homicide was fully supported by evidence; and, as has been said, the circumstances under which the killing was done made the crime one of murder. The newly discovered evidence related exclusively to the impeachment of witnesses, and, moreover, was met by an amply satisfactory counter-showing. On the whole, we find, after a careful study of the case, no cause

for setting aside the judgment denying the accused a new trial.

Judgment affirmed.

All the justices concurring.

Evidence.—Confidential communications between husband and wife are privileged, and the law forbids that they be detailed or divulged by either: Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135, 24 South. 154; Fuller v. Fuller, 177 Mass. 184, 83 Am. St. Rep. 273, 58 N. E. 588; Robinson v. Robinson, 22 R. I. 121, 84 Am. St. Rep. 832, 46 Atl. 455. But a third person hearing a conversation between them may give evidence of it. And a conversation between an accused and her husband tending to show an admission of her guilt to him and overheard by a person in an adjoining room, is not such a confidential communication as will be excluded: See the monographic note to Commonwealth v. Sapp, 29 Am. St. Rep. 414. Consult, also, People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572, 35 N. E. 951.

WOOLLEY v. GAINES.

[114 Ga. 122, 39 S. E. 892.]

INSANE PERSON, DEED OF.—AN INSTRUCTION to the the jury that if the grantees in a deed have no knowledge of the insanity of the grantor, the deed should be sustained notwithstanding her mental incapacity, is erroneous. (p. 23.)

INSANE PERSONS.—IGNORANCE BY ONE PARTY to a contract that the other party was insane when it was executed does not affect the validity of the instrument. (p. 24.)

James B. Conyers and B. J. Conyers, for the plaintiffs in error.

John H. Wikle, contra.

122 LEWIS, J. The plaintiffs below brought suit to recover from the defendants certain land in Bartow county. The only controversy in regard to the title was as to the validity of a warranty deed from Sarah Woolley, under whom both the plaintiffs and the defendants claim, conveying the property in dispute to the plaintiffs, Gaines and Lewis. It was claimed that this deed was fraudulently obtained, and was void, because at the time of its execution Sarah Woolley was insane and incapable of making a valid contract. The conveyance recites a consideration of four hundred and sixty dollars, which the plaintiffs alleged was the amount of an in-

debtedness due them by Sarah Woolley, the deed being made in satisfaction of that indebtedness. Considerable evidence was introduced as to the mental condition of Sarah Woolley and her capacity to understand what she was doing when she signed the deed in question, and this evidence was more or less conflicting. On this point the court charged the jury as follows: "If you find that she [Sarah Woolley] was of weak mind, and that [123] weakness amounted to imbecility, and therefore she did not have mental capacity to make this deed, then you will go further and ascertain whether or not Gaines and Lewis, or either of them, knew or had knowledge of her mental imbecility at the time of the execution of the deed; for if she was mentally incapacitated to make the deed, and Gaines and Lewis did not have knowledge of the fact and took the deed in good faith, then her mental incapacity would not warrant you in setting aside the deed, and you would sustain the deed notwithstanding her mental incapacity, if you find that they did not know or had no knowledge of the fact of her mental imbecility." The jury returned a verdict for the plaintiffs, and the defendants excepted.

The portion of the charge of the court which we have quoted was plainly error. No question as to the knowledge or want of knowledge of the plaintiffs, or either of them, concerning the mental condition of Sarah Woolley, should have been injected into the case. "A person whose mind is so unsound as not to have capacity to contract is incapable of making a binding deed of conveyance. But the deed of one who has not been judicially declared insane is not wholly void; it conveys the seisin, and must therefore be avoided at the grantor's instance after restoration to reason, or at the instance of his heirs or legal representatives after his death": 9 Am. & Eng. Ency of Law, 2d ed., 119. "The contract of an insane person who has never been adjudged insane by any tribunal of competent jurisdiction is voidable, after his death, at the option of his personal representatives": Bunn v. Postell, 107 Ga. 490, 33 S. E. 707, and cases cited. And it is well established by the repeated rulings of this court, based upon sound authority, that ignorance by one party to a contract that the other party was insane when it was executed does not affect the validity of the instrument. See American etc. Banking Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182, where it was held that a bank would not be protected in paying the check of a person who had been lawfully adjudged

to be insane, and who was in fact insane when the check was drawn, although the fact of insanity was unknown to the bank at the time of payment and the adjudication of insanity was made in another state. Directly in point, also, is the case of Orr v. Equitable Mtg. Co., 107 Ga. 499, 33 S. E. 708, where the following language is used: "That the other party to the contract was ignorant that the person with whom he was dealing was [124] in fact insane, and that the existence of such insanity could not have been discovered by an ordinarily reasonable and prudent person, does not make such a contract valid and binding, nor interfere with the right of the legal representative to set up, in defense to an action brought against him on the contract, the insanity of the decedent." To the same effect see Bunn v. Postell, 107 Ga. 490, 33 S. E. 707. The rule is based upon the very excellent reason, as stated in Bishop on Contracts, section 970, that "since insanity incapacitates one to make a contract, the mere fact of the other party's not knowing it does not render good what he was legally incompetent to do."

The authorities relied on by counsel for the defendants in error in combating this position have no application to the case under consideration. They presuppose such an execution of the contract as that the parties cannot be placed in the position they occupied before it was made. No such state of facts is involved in the present case. From all that appears, except for the deed given to Gaines and Lewis by Sarah Woolley and the verdict obtained by them at the trial below, they are already in statu quo. No money or thing of value has passed out of their hands in consideration of the conveyance. It does not appear that the debt in satisfaction of which the deed is alleged to have been given was made in contemplation of the conveyance of this land. They cannot, therefore, take advantage of the equitable rule which they invoke, as there is nothing upon which to base their contention, so far as the record before us is concerned.

The motion for a new trial contains numerous other grounds, but other than as above set out we see no errors of sufficient importance to require a reversal of the judgment. We send the case back for a new trial solely on the ground of error in the charge which we have quoted.

Judgment reversed.

All the justices concurring.

The Contract of an Insane Person is generally considered voidable merely and not void: Aetna Life Ins. Co. v. Sellers, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97. Compare American Trust etc. Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182. As to the effect of want of notice of the insanity on the part of the other contracting party, see the monographic note to Flach v. Gottschalk Co., 71 Am. St. Rep. 427-429.

The Deed of an Insane Person is voidable only and not void, at least if executed before an inquisition and finding of lunacy: French Lumbering Co. v. Theriault, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927; monographic note to Flach v. Gottschalk, 71 Am. St. Rep. 431. If the grantee has no knowledge of the infirmity, he must be tendered the consideration paid, if the deed is to be avoided: Eldredge v. Palmer, 185 Ill. 618, 76 Am. St. Rep, 59, 57 N. E. 770; note to Flach v. Gottschalk Co., 71 Am. St. Rep. 431.

ANDREWS & CO. v. KINSEL.

[114 Ga. 390, 40 S. E. 300.]

NEGLIGENCE—PROXIMATE CAUSE.—To enable one to recover for damages from the negligent conduct of another, it must appear that the negligence of the defendant was the proximate cause of the injury sustained. (p. 26.)

NEGLIGENCE—INTERVENING CRIME OF THIRD PERSON.—If it appears on the face of the petition in an action for damages that there intervened, as a direct cause, between the negligence of the defendant and the damage to the plaintiff, the independent criminal act of a third person, a demurrer to the petition should be sustained. (pp. 27, 28.)

T. T. & B. S. Miller and Goetchius & Chappell, for the plaintiffs.

Hatcher & Carson, for the defendant.

390 LEWIS, J. Andrews & Co. sued Kinsel for five hundred dollars damages, making by their petition substantially the following case: The plaintiffs rented from the defendant a storehouse in the city of Columbus, in which they transacted a mercantile business, and it was the duty of the defendant, as the landlord of the plaintiffs, to keep the premises in good repair. The defendant also owned the storehouse adjoining that rented by the plaintiffs, a partition wall dividing the two stores. On a named day the defendant, by his agents and servants, entered his storehouse adjoining the plaintiffs' place of business, for the purpose of making certain repairs thereon, and in making the repairs the partition between the

two storehouses was removed, or partly removed, leaving the store of the plaintiffs exposed and unprotected; and upon leaving the place at night, the defendant's agents and servants negligently and carelessly left open two rear windows in the store next to that of the plaintiffs, thereby rendering it easy to effect an entrance into the plaintiff's store through the rear windows and the opening in the partition. On the night in question a burglar or burglars did gain entrance to the plaintiffs' store in the manner described and steal from the plaintiffs a large quantity of merchandise, to their damage as aforesaid. No notice was given to the plaintiffs that the partition had been removed, or that the windows had been left open; and this also is alleged to have been negligence. The defendant filed a demurrer to the petition, which was overruled; and he also [391] filed an answer, in which he denied liability, and denied that he had been negligent as alleged. The case went to trial, and at the conclusion of the evidence for the plaintiffs, the court, on motion of defendant's counsel, granted a nonsuit. To this ruling the plaintiffs excepted, and the defendant filed a cross-bill of exceptions in which he assigned error upon the overruling of his demurrer.

1. As, in our opinion, the court below should have sustained the demurrer filed by the defendant, and the refusal to do so was reversible error, the writ of error issued upon the main bill of exceptions will, under the ruling of this court in Rives v. Rives, 113 Ga. 392, 39 S. E. 79, be dismissed.

2. It is unnecessary to argue or to cite authorities to sustain the well-settled legal principle that, to enable one to recover for damages resulting from the negligent conduct of another, it must appear that the negligence of the defendant was the proximate cause of the injury sustained. It is also a well-recognized principle that where there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person producing the injury, and without which it would not have happened, the latter is properly held the proximate cause of the injury, and the defendant is excused: 8 Am. & Eng. Ency of Law, 2d ed., 580. As is stated in 1 Shearman and Redfield on Negligence, fifth edition, section 25: "The defendant's negligence may put a temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured, and yet the defendant's negligence may be in no sense a cause of the injury."

Thus, in Tennessee, a defendant was held not liable for the negligent failure to keep a night watchman on guard over the property of the plaintiff, as a result of which an incendiary set fire to the property: State v. Ward, 9 Heisk. 133. In New York it is held that the relation of cause and effect between the negligence of the defendant and the injury to the plaintiff cannot be made out by including the independent illegal acts of third persons, and that the defendant cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts: Olmstead v. Brown, 12 Barb. 662. And in Crain v. Petrie, 6 Hill, 524, 41 Am. Dec. 765, the following language is used: "To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful [892] act of a third party remotely induced thereby": See, also, Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359; Bosworth v. Brand, 1 Dana, 377; Carpenter v. Pennsylvania R. R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203. This principle is also well established in Georgia by the cases of Belding v. Johnson, 86 Ga. 177, 12 S. E. 304, and Henderson v. Dade Coal Co., 100 Ga. 568, 28 S. C. 251. In the former case it was held that a widow could not recover damages of a barkeeper for the homicide of her husband, who was killed in an encounter with a third person, the quarrel leading up to the encounter having been the result of intoxication produced by liquor illegally sold to the slayer of plaintiff's husband by the barkeeper. In the Henderson case, the lessee of a convict was held not liable for the criminal act of the convict, by which a third party suffered damage, although the lessee negligently placed it in the power of the convict to commit the crime. These cases, it will be seen, are closely in point. The rule is aptly and rather quaintly stated in Wharton on Negligence, second edition, section 134, in the following language: "I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in, and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces." Applying these principles to the case now before us, it is manifest that the plaintiffs did not

make out a cause of action by their petition. Granting as true all of their allegations as to the negligence of the defendant, it is also true, upon the face of their pleadings, that there intervened, as a direct cause between the negligence of the defendant and the damage sustained by themselves, the independent criminal act of a responsible human agency. The demurrer to the petition should have been sustained.

Writ of error on main bill of exceptions dismissed; judgment on cross-bill reversed.

All the justices concurring.

The Doctrine of Proximate Cause is discussed at length in the monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807-861. Negligence, in order to sustain an action for damages, must be the proximate cause of the injury complained of: Knox v. Eden Musee etc. Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988; Evansville etc. Ry. Co. v. Welch, 25 Ind. App. 308, 81 Am. St. Rep. 102, 58 N. E. 88; Odin Coal Co. v. Denman, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; Roach v. Kelly, 194 Pa. St. 24, 75 Am. St. Rep. 685, 44 Atl. 1090. A responsible agent intervening between the original negligence and the injury cuts off the line of causation and relieves the originally negligent party from liability: McGahan v. Indianapolis etc. Gas Co., 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601; Fowles v. Briggs, 116 Mich. 425, 72 Am. St. Rep. 537, 74 N. W. 1046. However, it is not every intervening agency that will shield the wrongdoer from responsibility: Reid v. Evansville etc. R. R. Co., 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; Boston etc. Rubber Co. v. Kendall, 178 Mass. 232, 86 Am. St. Rep. 478, 59 N. E. 657.

TILLMAN v. DUNMAN.

[114 Ga. 406, 40 S. E. 244.]

A BIDDER AT AN AUCTION SALE MAY WITHDRAW his bid at any time before the hammer falls or the property is knocked off to him. (p. 31.)

AN OFFICER OFFERING PROPERTY AT A JUDICIAL SALE MAY WITHDRAW it before it is knocked off, except when his discretion is controlled by the order of sale. (p. 32.)

A BIDDER AT A JUDICIAL SALE ACQUIRES NO RIGHT to compel a conveyance of the property until it is knocked off to him. (p. 32.)

AN EXECUTOR MAY WITHDRAW PROPERTY OFFERED FOR SALE at public outcry after bids are received and cried, but before it is knocked off to the highest bidder. (pp. 31, 32.)

THE HIGHEST BIDDER AT AN EXECUTOR'S SALE ACQUIRES NO RIGHT to compel a conveyance of the property by

the executors if the property is withdrawn before being knocked off. And he has no right to inquire into the motives of the executors in withdrawing the property, nor can he make the question that their act is against public policy. (pp. 32, 33.)

Hatcher & Carson, for the plaintiff.

Terrell & Terrell and J. B. Burnside, for the defendants.

407 LITTLE, J. Tillman filed an equitable petition in the superior court of Harris county, against P. W. and J. E. Dunman, executors of Joseph Dunman, deceased, and T. T. and G. N. Murrah, and Murrah Brothers, praying that the executors above named be required to execute and deliver to him a deed to certain described lands; that T. T. and G. N. Murrah or Murrah Brothers be required to surrender for cancellation such deeds of conveyance as they may have received from these executors, as being a cloud on petitioner's title; that all the defendants be restrained and enjoined from changing the status of the property; and for general relief. The allegations of the petition are substantially as follows: Joseph Dunman died testate, seised and possessed of certain described property; his will was duly probated, and letters testamentary issued to P. W. and J. E. Dunman, who as executors entered into possession of the lands of their testator for the purpose of administering his estate and carrying out the terms of the will, under the provisions of which they duly advertised for sale certain lands of decedent, for the purpose of paying the debts of the estate, and for distribution among the legatees, according to the statute and the terms of the will. The advertisement recited that the land was to be sold in five parcels "for cash," before the courthouse door of Harris county, on the first Tuesday in February, 1900. At that time and at the place above stated, petitioner being present, the executors read the advertisement publicly and began to sell the land in the order and parcels as therein stated. Petitioner, with others, bid for the same, and two parcels were knocked off to him, and one to another bidder. A certain described parcel of the land was then offered and cried for sale, and petitioner bid thereon, as did one of the defendants in this case (Murrah), and others present, and the bids were accepted and cried until finally petitioner bid a certain sum which was accepted and cried by the auctioneer conducting 408 the sale, and no person would raise petitioner's bid, which was the best and highest bid. Murrah then announced pub-

licly that Murrah Brothers or himself had bought this tract at private sale, and whoever bought it would buy a lawsuit, and that he claimed the property, after which the bidding was continued, when petitioner announced that his bid had been accepted and cried, and if anyone wanted to bid, then to raise his bid; but no one raised it, and he claimed the property, his bid being the highest and best offer. The executors then consulted their attorney, and said they would withdraw that parcel from sale, and then proceeded to sell the remaining tracts advertised. Petitioner publicly announced that he claimed the property, and denied the legal right of the executors to withdraw the land from sale, to consummate a private sale previously made for a less amount than his bid; and thereupon tendered the amount of his bid and demanded that the executors make him a deed to the tract, and they refused to accept the money or execute and deliver to him a deed to the same. Petitioner thereafter frequently tendered the purchase price to the executors, and tenders the same into court upon filing his petition. It is charged that T. T. and G. N. Murrah, either as individuals or as a firm, have entered into a combination or conspiracy with the executors to defeat petitioner's title and prevent his possession and ownership of the land, and have procured from the executors deeds of conveyance thereto, and are now in possession claiming title to the same. This tract of land has not since been advertised by the executors, who claim that they had made a private sale of this land to T. T. and G. N. Murrah, and that, when petitioner bid a higher price at the sale than had been agreed on at this private sale, they were forced to withdraw the land and protect the purchasers in their private bargain. Petitioner insists that, after he had bought two parcels or tracts of the land, it would be inequitable and unjust for the executors to refuse to accept his bid for another tract, and consummate a sale of same, made privately before the date of the sale as advertised, at a less price than was bid by the petitioner at the sale. A general demurrer to this petition was sustained by the trial judge, and the petition dismissed; and to the order sustaining the demurrer and dismissing the petition Tillman excepted.

1. The questions to be determined in this case are, whether an executor has the right to withdraw property from sale, after it has been [409] duly advertised and offered for sale at public outcry by an auctioneer employed by the executor,

and bids are received and cried, before the same is knocked off to the highest bidder; and whether the highest bidder in such a case acquires any right, by reason of his bid, to compel the executor to accept the same and make him a deed upon tender of the amount so bid. As a decision of these two questions is controlled by the same principle of law, they will be considered together. It is well-recognized law that a bidder at an auction sale may withdraw his bid even after it has been cried, at any time before the hammer falls or the property is knocked off to him: See Payne v. Cave, 3 Term Rep. 148; 3 Am. & Eng. Ency. of Law, 2d ed., 501, and cases there cited. In Payne v. Cave, 3 Term Rep. 148, the principle underlying this rule is thus stated: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract; that is signified on the part of the seller by knocking down the hammer. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." For the same reason the seller has the right to withdraw the property before it is knocked off to the bidder. Mr. Story, in his treatise on the Law of Sales, section 461, states the rule thus: "In a sale by auction the seller may withdraw the goods, or the bidder may retract his bid, at any time before they are knocked off; for so long as the final consent of both parties is not signified by the blow of the hammer, there are only mutual propositions, but no mutual agreement to one definite proposition": See 2 Kent's Commentaries, 4th ed., *537; Carrvolles v. Mossy, 2 La. 504. But it is claimed that this rule of auction sales does not apply to sales by administrators and executors, as they are regulated by statute, which must be strictly complied with; and that while such representatives are vested with large discretion, they cannot lawfully withdraw property when it has been exposed for sale after due advertisement. There is a close resemblance between an executor's or administrator's sale, when made under an order of court, to one made under an execution or decree, or other compulsory process; but where the sale is made under a power contained in the will, the executor's sale more nearly resembles that of an individual offering his property for sale. But granting, for the sake of the argument, that the sale in question rested upon the same footing with judicial sales, we find that it has been determined that [410] an officer of court has a right to withdraw property, even when offered for sale under com-

pulsory process, and bids have been received and cried, and that the bidder at such a sale acquires no right to compel the officer to convey the property, even where his bid is the best and highest, unless the property is knocked off to him or the hammer falls, and the sale is thus completed. Mr. Freeman, in his work on Executions, volume 2, section 288, page 1665, says, on authority: "Officers charged with the duty of conducting chancery, trustee, and other involuntary sales have also a discretion to withdraw the property after being offered for sale." In the case of Miller v. Law, 10 Rich. Eq. 320, 73 Am. Dec. 92, it was ruled that: "The commissioner has a discretion, subject to the control of the court, to withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest bidder is not entitled to a conveyance, there being no contract with him." It was ruled by the supreme court of the United States, in the case of Blossom v. Railroad Co., 3 Wall. 196, that: "A bidder at a judicial sale at public auction, whose bid has not been accepted, ... cannot insist, even though he have been the highest and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale made to him." Mr. Justice Clifford, in delivering the opinion of the court in that case, after stating the rule above quoted from Story on the Law of Sales, says: "The same rules prevail upon a sale under a common-law process as in other cases of sales at public auction." From the foregoing authorities it seems to be well settled that, on principle as well as by well-considered adjudications, the officer offering property at a judicial sale, except where his discretion is controlled by the order of sale, can withdraw the property offered for sale before the same is knocked off; and that a bidder at judicial sales acquires no right to compel a conveyance of the property offered, until the same has been knocked off to him. See also, in this connection, Scales v. Chambers, 113 Ga. 920, 39 S. E. 396. It would, therefore, seem that even if the rule governing judicial sales is to be applied to the sale by the executors in the present case, they had the right to withdraw the property offered from sale; and that Tillman, by reason of being the highest and best bidder at such sale, acquired no right to compel a conveyance by the executors, as the property was withdrawn before the same was knocked off to him by the auctioneer, for the reason that there was no acceptance of his offer, and no contract.

411 2. But it is contended that it would be inequitable for the executors, after having advertised the land and after having sold to petitioner other parcels, to withdraw this parcel from sale when he desired it to complete the tracts which he had purchased; and that to allow the executors to withdraw the land from sale for the purpose of carrying out a private sale for less than the amount of petitioner's bid is against public policy. The reply to this contention is that petitioner, having acquired no right to compel a conveyance to him, and in fact having acquired no right at all, since his offer was rejected, is a stranger to that transaction, and has no right to inquire into the motives which prompted the executors to withdraw the property from sale; and, being such, he cannot make the question that the act of the executors was against public policy. The acts of the executors are open to inquiry only to the creditors, heirs, or legatees of the deceased, or to some other person having a beneficial interest in the estate of the testator. We are therefore of opinion that the trial judge did not err in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

All the justices concurring.

Judicial Sale.—A bidder at a sheriff's sale may withdraw his bid at any time before the property is struck off to him: Fisher v. Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335. See, also, Dunham v. Hartman, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 283. And a commissioner may withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest and last bidder is not entitled to a conveyance, there being no contract with him: Miller v. Law, 10 Rich. Eq. 320, 73 Am. Dec. 92.

SEALS v. STATE.

[114 Ga. 518, 40 S. E. 731.]

RAPE—EVIDENCE OF UNCHASTITY.—In a prosecution for rape, evidence of the previous unchaste character of the woman is admissible both to discredit her as a witness and to disprove that the intercourse was forcible and against her consent. (pp. 34, 35.)

R. P. Jones and F. R. Walker, for the plaintiff in error.

C. D. Hill, solicitor general, contra.

[518] LUMPKIN, P. J. The plaintiff in error was convicted of rape, and brings here for review a judgment denying him a new trial. Cora Jones, the alleged victim of the crime, was sworn as a witness. Her testimony made out a strong case of rape, except that it was unsatisfactory as to whether or not there was actual penetration. There was testimony tending to show that she had previously been a virtuous woman, and evidence to the contrary attacking her character for chastity. In this connection the court charged: "Her character for virtue is immaterial, except as it may affect her character for veracity. That is, may affect the credit you may give to her testimony." This charge was excepted to as erroneous in that it too greatly restricted the jury as to the purposes for which they could consider the evidence tending to show that before the alleged crime the witness was a lewd woman. In our opinion, this criticism upon the charge is well founded; and inasmuch as the instruction given to the jury had a vital bearing upon the main issue [519] in controversy, we are constrained to order a new trial. It is now well settled that in prosecutions for rape the defense may introduce evidence tending to prove the previous unchaste character of the woman; and this evidence is admissible for two purposes: one to discredit her as a witness, and the other to disprove the charge that the intercourse was forcible and against her consent. For this latter purpose, evidence of the nature indicated would clearly be admissible even where the alleged victim of the rape was not sworn as a witness in the case. The whole law of this subject was pithily stated by Judge Nisbet in a single sentence in the case of Camp v. State, 3 Ga. 422. He said: "The fact of assent may, in reason, be well left to the jury, upon proof of ill or evil fame." In 19 American and English Encyclopedia of Law, 961, the rule is thus stated: "The general reputation of the female for chastity may be shown by the defense, not in justification, but on the issue as to the probability of her consent." In 2 Bishop's Criminal Practice, third edition, section 965, the author says: "Though in ordinary cases it is not allowable to prove that an adverse female witness is unchaste—and the ravishment of a prostitute is, in law, rape, the same as of any other woman—still one on trial for this crime may bring forward, in his defense, the bad reputation for chastity—not particular acts—of the complaining witness; or, by the better opinion, the fact of her being a common prostitute. This evidence is

sometimes regarded as properly impairing her credibility—a doubtful proposition, and in some of the cases denied. But it helps the probabilities that the connection was voluntary on her part, and that his manifestations of apparent force came rather from his presuming her consent than from a purpose to ravish her." From this it will be seen that though Mr. Bishop doubted the admissibility of evidence of this nature for the purpose of impairing the credibility of the witness, he emphatically lays down the proposition that such evidence has a direct and independent bearing upon the question of consent. The same author elsewhere declares that "in the matter of evidence, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented": 2 Bishop's New Criminal Law, sec. 1119. We extract the following from 1 Wharton's Criminal Law, tenth edition, section 568: "The real question in such cases is, Is it material to the issue whether the prosecutrix had previously such illicit intercourse? That it is no defense to an indictment for rape that the prosecutrix was a woman of loose [520] character there can be no question; and if the fact of a forcible connection against the prosecutrix's will be established, her prior looseness would have nothing to do with the issue. On the other hand, when the issue is consent on the part of the prosecutrix, her prior history as to chastity is logically material." In his work on Criminal Procedure, page 248, Maxwell states the law to be: "The previous conduct of the prosecutrix, as to whether or not she had connection with other men, is a proper subject of inquiry, as tending to show a want of chastity, and therefore that she would be more likely to consent than a virtuous woman—it is a circumstance for [the jury's] consideration as bearing upon the question of consent."

From the foregoing it seems to be well established that, independently of the question of the woman's credibility as a witness, the jury may properly consider evidence of her previous bad character for chastity, in determining whether or not she really consented to the sexual intercourse which she testifies was had against her will; and in a case like the present, where practically the only defense relied on was that no force whatever was used, the jury should be accurately instructed to the effect above indicated. The court not only failed to do this, but charged to the contrary; and consequently, as above stated, we have no alternative except to order a new trial. It

is impossible to say with certainty that the incorrect charge did not injuriously affect the accused.

Judgment reversed.

All the justices concurring.

In Prosecutions for Rape, Evidence that the reputation of the prosecutrix for chastity is bad is admissible: Note to Smith v. State, 80 Am. Dec. 368; State v. Taylor, 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729. Compare State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022; and see the discussion of this subject in the monographic notes to State v. Sibley, 53 Am. St. Rep. 482; Smith v. State, 80 Am. Dec. 368, 372.

WESTERN UNION TELEGRAPH COMPANY v. FLINT RIVER LUMBER COMPANY.

[114 Ga. 576, 40 S. E. 815.]

CONTRACT BY TELEGRAPH—MISTAKE IN TRANSMISSION.—If a message is delivered to a telegraph company containing an offer to sell merchandise at a certain price, and the company so transmits it as to contain an offer at a less price, the sender is bound to furnish the merchandise at the latter price, and he may recover from the company the damages sustained by complying with the offer. (pp. 39, 41.)

W. M. Hammond and A. H. Russell, for the plaintiff in error.

B. B. Bower, Jr., contra.

576 COBB, J. The Flint River Lumber Company brought suit against the Western Union Telegraph Company in the city court of Decatur county, alleging in its petition, in substance, as follows: On May 31, 1897, the plaintiff, in answer to a telegraphic inquiry from R. B. Currier, of Springfield, Massachusetts, asking for prices of lumber in five carload lots, delivered to the defendant, to be transmitted to Currier, a telegram which read as follows: "For quick shipment and quick net cash will make price twenty fifty; answer." By a mistake of the telegraph company in transmitting the telegram, when delivered to Currier, it read: "For quick shipment and quick net cash will make price twenty five; answer." The meaning of this telegram, as it was interpreted by lumbermen, and in the light of the terms of the telegram to

which it was an answer, as well as in the light of the fact that the market price of lumber was at that time nowhere near twenty-five dollars per thousand, would be that the plaintiff offered to Currier the lumber at the price of twenty dollars per thousand feet in five carload lots. The offer as thus understood by Currier was accepted by him and the lumber shipped, and when demand was made for payment the telegram with the error in it was displayed; and plaintiff avers that by reason of this error, which [577] was brought about by the carelessness of the defendant, it has suffered a loss of forty-five dollars, which the defendant refuses to pay. The defendant filed demurrers both general and special, which were overruled. The case came to trial upon the petition and answer, was submitted to the judge without the intervention of a jury, and he rendered judgment for the plaintiff for forty-four dollars and twenty cents. The case was carried to the superior court by certiorari. Upon the hearing in that court the certiorari was overruled, and to this judgment the defendant excepted. The demurrer raises what is the controlling question in the case, and that is, whether the plaintiff was legally bound to deliver to Currier the five carloads of lumber at the price stated in the telegram as it was delivered to him, that is, at the rate of twenty dollars per thousand feet, when the offer made by the plaintiff was really one to sell the lumber at twenty dollars and fifty cents per thousand feet. Is a telegraph company such an agent of the sender of a telegram that he would be bound to the addressee upon whatever terms the telegram as delivered to him contained, notwithstanding the telegram as originally delivered to the telegraph company was materially different from that delivered to the addressee? On this question the authorities are not agreed. There are some holding that the telegraph company is not the agent of the sender but is an independent principal, and that where a mistake in transmission is made, there is no valid contract between the parties, for the reason that the minds of the parties have never met. There are others holding that even if the telegraph company is the agent of the sender, the agency thus created is special, and that it is not within the scope of the authority of such an agent to make any other contract than the one contained in the telegram delivered to the telegraph company; and that therefore the sender is not bound upon the contract unless the telegram is correctly transmitted. Other authorities hold,

without qualification, that the telegraph company is the agent of the sender, and that he must stand by the proposition as embodied in the message delivered by his agent, and make his demand upon it for the damages which have been sustained by its neglect. Still others qualify this rule by saying that the party who first invites the use of the telegraphic agency impliedly undertakes to assume the risk of mistakes by the telegraph company: See Joyce on Electric Law, secs. 903-907. The author cited, after an elaborate discussion and a close examination into the question as to what is the relation between [578] the telegraph company and the sender of a telegram, concludes in this language: "We must confess that we believe there can be no logical deduction from the various principles involved as to what should be the rule. The determination must contain some element of what is called a 'moral' ground, or must be an arbitrary, absolute one": Joyce on Electric Law, sec. 907. See, also, an article written by M. J. Stevenson, Esq., in 54 Cent. L. J. 23.

If the question were an open one in this state, we must admit that upon principle there would be serious difficulties in the way of holding that a telegraph company is such an agent of the sender of a telegram as that he would be bound by the terms of the telegram delivered to the addressee, when they are materially different from the terms of the telegram as delivered for transmission. If the telegraph company is an agent at all, it must be either a general agent or a special agent. It cannot, of course, be contended that it is in any sense a general agent to make contracts in behalf of those who use the telegraph as a means of communication, and the agency must therefore be of a character known to the law as a special agency. If this is true, the agency being of a limited character, it is created for the purpose only of communicating to the addressee the exact contents of the telegram as delivered to it, and communicating a telegram containing anything else is not within the scope of the authority of such an agent. If we were called upon to determine this question solely upon authority, we would also be met with serious difficulties; for the courts of England all seem to hold that the telegraph company is not the agent of the sender, and that the sender is not bound by the mistakes of such company, and courts of respectable standing in this country disagree as to what is the relation between the telegraph company and the sender of a telegram. When one delivers a

telegram to a telegraph company, the undertaking of the company is, of course, to transmit and deliver promptly and accurately, and the sender would have a right of action against the telegraph company for any damages he has sustained on account of its failure to transmit the telegram promptly and accurately, and, if no actual damage were sustained, he would be entitled to at least nominal damages for the breach of the contract. But the question in the present case is, when one asks another to make an offer for the sale of an article, and the offer thus requested is made by telegraph, and the telegraph company [579] transmits a different offer from the one delivered to it for transmission, is the person making the offer bound by the terms of the offer delivered by the telegraph company, notwithstanding it may be materially different from the terms of the offer as delivered to the company for transmission? In other words, if a message is delivered to a telegraph company containing an offer to sell merchandise at a certain price, and the company so transmits and delivers the message as to make it contain an offer to sell at a less price, is the sender bound to furnish the merchandise at the latter price? If so, then of course it would follow that whatever damage he has sustained by a compliance with the offer as actually delivered to the addressee of the telegram would be properly chargeable to the telegraph company on account of the breach of its contract. In his work on Electric Law, referred to above, Mr. Joyce says: "If the telegraph company is not the agent of the sender, or of the party who invites the use of this instrumentality, then the telegram of acceptance, as delivered for transmission, and not the one delivered to the addressee, binds. The latter, when erroneous, is not the real acceptance, the minds of the parties have never met, and there is no contract; this would compel the addressee to act at his peril, or have the message repeated, at perhaps a loss of time which might make the contract valueless": Joyce on Electric Law, sec. 906.

The present case, we think, is controlled, at least in principle, by the ruling made by this court in the case of Western Union Tel. Co. v. Shotter, 71 Ga. 760. In that case Shotter brought an action against the telegraph company for damages on account of mistakes made in the transmission of a telegram. He delivered a telegram to the defendant, addressed to a party in Chicago, which read, "Can deliver hundred tur-

pentine sixty-four, immediate reply." The telegram as delivered to the addressee read sixty instead of sixty-four, and a reply was sent to ship "one hundred barrels as quoted." Plaintiff shipped the one hundred barrels, and upon demand for payment the addressee refused to pay more than sixty cents per gallon for the turpentine, and an action was brought against the telegraph company for the difference between the price stated in the telegram as delivered to the company and the price stated in the one as delivered to the addressee. The defendant demurred to the plaintiff's petition, on the ground that the damages were not the legal and natural consequence of the [680] failure to transmit the telegram correctly, but were the result of the plaintiff's voluntary and gratuitous act in accepting less for the turpentine than he had offered to accept. The court overruled the demurrer. In the opinion Mr. Chief Justice Jackson says: "But the plaintiff in error raises the question that the defendant in error, plaintiff below, was not obliged to let the turpentine go at that price; that he was not bound by the mistake of the telegraph operators, and voluntarily let the turpentine go too low. Whether the telegraphic operator be the agent of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not, and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though by mistake of the agency he used to convey it, and when he does so settle in good faith, and is induced to do so by the negligence of the telegraphic company, through its servants, that company should respond to him in damages, whether absolutely bound by his contract or not; and that the measure of his recovery from the company should be as stated above." It seems to us that the ruling just referred to is absolutely controlling in the present case; and while the learned chief justice in some of the language used rather casts a doubt upon whether the sender is absolutely bound by the terms of the telegram as erroneously transmitted and delivered to the addressee, still the decision in that case held the sender bound and allowed him to recover from the telegraph company on the ground that he was bound and that the addressee could have held him liable on the contract, and that

he was not entitled to recover from the addressee any more than the amount stated in the telegram as delivered to him, and, being so bound, the telegraph company was liable for the difference between the price stated in the telegram delivered for transmission and that stated in the telegram delivered to the addressee. But no matter how we view the ruling in the Shotter case, it is directly controlling in the present case; for, if the sender was bound by the terms of the telegram as delivered to the addressee, upon the principle of the Shotter case, the plaintiff in the present case would be entitled to recover; or if, as intimated by the learned chief justice, Shotter [581] might not have been absolutely bound by the terms of the message delivered to his addressee, he certainly was as much bound as was the plaintiff in the present case. The Shotter case is referred to by Mr. Joyce, and is construed by him to be a ruling that the telegraph operator is the agent of the sender of the telegram: Joyce on Electric Law, sec. 903.

We have been unable to find any other decisions of this court bearing even indirectly upon the question now under consideration. It seems that the ruling made in this case has from the time of its rendition been silently acquiesced in by the profession, and the general assembly has not during that time seen fit to change the rule therein laid down. For nearly twenty years this rule has been the law of this state, and after this lapse of time we would not feel justified in overruling the decision, even if a review of the case had been requested, although we may have some doubt as to the conclusion therein reached, both upon principle and authority. There was no request to review the case, and we could not do otherwise than follow it in the present case, even if we were disposed to hold to the contrary. It may be said, however, that the decision, though possibly subject to the criticism that it is not entirely consonant with established principles of law, does have for its foundation an admixture of justice and natural equity, an adherence to both of which was a controlling characteristic of the able and learned chief justice who rendered the opinion, especially in cases where he felt that justice would be defeated by applying too strictly the rigid rules of the common law to the conditions and agencies of modern times, which were never for a moment dreamed of by the compilers and expounders of the ancient English law. We are therefore of opinion that the petition set forth a cause of

action, and was not subject to any of the objections set up in the demurrers.

2. Currier telegraphed to the plaintiff as follows: "Can you say twenty dollars for five cars number one, reply?" The telegram received in reply read, "For quick shipment and quick net cash make price twenty five." On the trial the court allowed, over objection of the defendant, parol evidence to be introduced to show what was the meaning among lumbermen of the telegram as delivered to Currier, and the testimony so introduced showed that the telegram would be interpreted by men engaged in the lumber business as an offer to sell five cars of lumber at twenty dollars per thousand feet. This ruling is one of the errors assigned in the petition for certiorari. [582] When the telegram from Currier to the plaintiff and the telegram which was delivered to Currier are read together, no other conclusion can be reached than that the plaintiff was offering to sell five cars of lumber at twenty dollars per thousand feet, when these telegrams are considered in connection with evidence which was uncontradicted and which was admitted without objection, showing the character of the transaction to which the telegrams related. The words "twenty" and "five," in the telegram sent by Currier, referred respectively to the price per thousand feet and the number of cars, and it was perfectly reasonable for him to construe the telegram received in response thereto as using these words in the same sense in which they were used in the telegram sent by him. The parol testimony showed simply that this was the proper interpretation of the telegram by men in the lumber business; and hence, even if the testimony was for any reason objectionable, the admission of it was harmless. In addition to this, in the light of the fact, which was shown by the evidence, that at the dates of the telegrams the market price of lumber was nowhere in the neighborhood of twenty-five dollars per thousand feet, which fact was known to both parties, it was more reasonable to construe the words "twenty" and "five" in the telegram received as referring respectively to the price of the lumber and number of cars than to construe the two words together as referring to price only. As a reasonable construction of the telegram was that plaintiff offered to sell five cars of lumber at twenty dollars per thousand feet, there was nothing in the terms of the telegram which required Currier to have the same repeated. In the case of Manly Mfg. Co. v. Western Union Tel. Co., 105 Ga.

235, 31 S. E. 156, the terms of the telegram were ambiguous and uncertain, and this court held that in such a case diligence required the addressee to have the same repeated before acting on it.

The evidence authorized the judgment rendered by the judge of the city court; there was no material variance between the allegations of the petition and the proof; there was no error committed which required a reversal of the judgment of the city court; and the judge of the superior court did not err in overruling the petition for certiorari.

Judgment affirmed.

All the justices concurring.

A Telegraph Company in accepting a message is under obligation to transmit it correctly: Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 82 Am. St. Rep. 89, 25 South. 232. If a land agent leaves a message directed to his principal and naming the price at which his property can be sold, and the company through error in the transmission raises the price, and the principal accepts the offer as received and executes a deed at that price, while the agent is compelled to conclude the sale at the price first named by him, the company is liable to the vendor for the difference between the prices: Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904. See, further, Hasbrouck v. Western Union Tel. Co., 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034; Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673; Western Union Tel. Co. v. Beals, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 908.

HURST v. GOODWIN.

[114 Ga. 585, 40 S. E. 764.]

A FATHER HAS NO RIGHT OF ACTION FOR INJURIES TO HIS MINOR CHILD, if they do not destroy or impair the ability of the child to render services to him. (p. 44.)

AN INFANT MAY MAINTAIN AN ACTION FOR DAMAGES on account of any tort resulting in damages to him, whether the tortious act affects the parent or not. (p. 44.)

AN INFANT MAY MAINTAIN AN ACTION FOR SLANDER by his next friend. (p. 44.)

Estes & Walker and L. A. Wilson, for the plaintiff in error.

S. W. Sturgis and R. G. Mitchell, Jr., contra.

COBB, J. Mattie Goodwin, by her next friend, brought against Hurst an action for slander, on account of words

alleged to have been uttered by him, which in effect charged her with fornication [586] with a negro. At the trial term the defendant moved to dismiss the plaintiff's suit, on the ground that no cause of action was set forth in the petition, for the reason that a minor had no right of action for slander. This motion was overruled. After the introduction of evidence for the plaintiff, a motion for a nonsuit was made upon the ground that it appeared from the evidence that the plaintiff was a minor living with her father, and that under this state of facts she was not entitled to recover, for the reason that the cause of action set forth in her declaration inured to the benefit of her father alone and she had no right to bring an action for the same. This motion was also overruled. The case proceeded to trial, and resulted in a verdict for the plaintiff. The defendant made a motion for a new trial, which was likewise overruled, and he filed a bill of exceptions complaining of the several rulings of the court above referred to.

If an infant is injured by the tortious conduct of another, and the effect of the injury is such as to deprive the father of the services of the infant, the father can maintain against the wrongdoer an action for whatever damages he may have sustained on account of being deprived of the services of his child. But this right of the father does not relieve the wrongdoer from liability for whatever damages accrue directly to the infant in the event the tort is one which resulted in damage to the infant. The above propositions are so well settled that it is useless to cite authority in support of them. It does not, however, follow that the right of action for injuries of every character to a minor child is in the father alone. If the injury is one from which the father does not sustain any damage, that is, which does not destroy or impair the ability of the child to render services to the father, there is no right of action in the father for the wrong done the child. The infant may maintain an action for damages on account of any tort committed resulting in damages to him, whether the tortious act affects the parent or not. As a general rule, the parent does not sustain damage from the defamation of his child's character, whether that defamation be oral or written, and ordinarily therefore the parent cannot maintain an action for slander or libel against the defamer of his minor child's character. But in all cases wherever defamatory words are spoken or written of a minor, the right of

action accrues to the minor, and suit therefore may be brought by him through the [587] medium of a guardian ad litem or next friend. If the defamatory words, whether spoken or written, are of such a character that in their effect they deprive the parent of the services of the child, then, under the principles above referred to, the father may maintain an action for the consequential damages resulting to him therefrom. But this would not affect the right of the infant to maintain an action for the damages accruing directly to him. The petition set forth a cause of action, the evidence fully warranted the verdict, and there was no error in overruling the motion for a new trial: See 18 Am. & Eng. Ency. of Law, 2d ed., 1052 (2); Newell on Slander and Libel, 2d ed., 369, 370; Odgers on Libel and Slander, 2d Eng. ed., *405.

Judgment affirmed.

All the justices concurring.

For Injury to a Minor Child, the father may maintain an action for loss of services, expenses, and the like, but the right of action for the personal injury still remains in the child: Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483; monographic note to Carey v. Berkshire R. R. Co., 48 Am. Dec. 622-624. An action for injury to a child lies in its name: Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273. An infant cannot recover for loss of time during his inability to labor from physical injuries: Peppercorn v. Black River Falls, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79.

CARHART v. WAINMAN.

[114 Ga. 632, 40 S. E. 781.]

AN INNKEEPER IS BOUND TO EXTRAORDINARY DILIGENCE in preserving the property of his guests intrusted to his care. (p. 46.)

AN INNKEEPER IS BOUND BY THE ACTIONS OF HIS SERVANTS within the scope of their employment. (p. 46.)

INNKEEPER.—THE DELIVERY OF A BAGGAGE-CHECK to an innkeeper by a guest is prima facie equivalent to a delivery of the baggage. (p. 47.)

INNKEEPER—LIABILITY FOR BAGGAGE.—A guest makes out a prima facie liability against an innkeeper when he shows the delivery of his railroad baggage-check to the innkeeper's servant, within the scope of whose employment is the getting and delivering of baggage to guests, and that the innkeeper refuses to deliver to him the baggage or the check. (p. 47.)

ATTORNEY'S FEES MAY BE ALLOWED A GUEST as part of his damages when the innkeeper capriciously refuses to deliver his trunk or baggage-check, and he is compelled to employ counsel to enforce his rights. (p. 47.)

Albert H. Russell and W. M. Harrell, for the defendant.

Randolph B. Russell and Sig. Nussbaum, for the plaintiff.

632 SIMMONS, C. J. An action was brought by Carhart against Wainman, the proprietor of a hotel. The petition alleged that the plaintiff went to Bainbridge, Georgia, on a certain train, and was given a check for his baggage (a trunk) by the agents of the railway company. On reaching Bainbridge plaintiff left the train and went to the hotel run by Wainman. Next morning he gave his baggage-check to a porter who was employed by the defendant at the hotel, and whose duty it was to receive baggage and deliver the same to the guests. The baggage was never delivered to plaintiff. He made repeated demands upon the proprietor for either the trunk or the check, but the proprietor refused to deliver either to him. The trunk contained his clothing and was of a stated value. The prayer of this petition was for the value of the trunk and its contents, and for attorney's fees. The defendant demurred on the ground that the petition set forth no cause of action, and did not allege that the trunk was ever delivered by the railroad company to the defendant or his agent or to anyone else upon the surrender of the check. The defendant also demurred specially to the prayer for attorney's fees. The court sustained the demurrers generally. The plaintiff excepted.

633 We think the petition set out a cause of action. An innkeeper is bound to extraordinary diligence in preserving the property of his guests intrusted to his care: Civ. Code, sec. 2935. He is also bound by the actions of his servants within the scope of their employment: Sasseen v. Clark, 37 Ga. 242. If, therefore, a traveler gives his railroad baggage-check to a servant of an innkeeper whose duty it is to receive and deliver baggage to the guests, and the baggage is lost after it comes into his hands, the innkeeper is liable for the value of the baggage lost. If, after he has received the baggage, the innkeeper refuses to deliver it to the guest upon demand, he would be likewise liable. The delivery of the baggage-check to the innkeeper was, prima facie, equivalent to a delivery of the trunk. The check was a token or re-

ceipt for the plaintiff's trunk. While it was not conclusive of the delivery, it was prima facie evidence thereof: 4 Elliott on Railroads, sec. 1655. The fact that the petition does not state that the porter received the trunk from the railroad company was not good ground of demurrer. That is a matter for defense. The innkeeper or his servant knew more about the delivery of the trunk than did the plaintiff. The defendant could easily show whether the trunk had been received or not, and it would be difficult for the plaintiff to do so. Of course, if it should appear that the trunk was not delivered by the railroad company, the innkeeper would not be liable. Being bound to extraordinary diligence in the preservation of the baggage delivered him by guests, it is incumbent on the innkeeper to show that the trunk was not received by him or his servants. The guest makes out a case, prima facie, when he shows the delivery of the check to the servant within the scope of whose employment was the getting of baggage and delivering it to the guests, and that the innkeeper has refused to deliver to him the baggage or the check.

As to the special demurrer to the claim for attorney's fees, if the trial judge put his judgment upon that ground, he was no less in error. The petition alleged that the innkeeper had capriciously refused to comply with the plaintiff's demands for the delivery of the trunk or the check, and that the plaintiff was compelled to employ counsel to enforce his rights. If these allegations are true, then, under the Civil Code, section 3796, the jury might allow the plaintiff his attorney's fees as damages.

Judgment reversed.

All the justices concurring.

Innkeepers.—The law imposes on an innkeeper an extraordinary liability for the protection of the baggage of his guest: O'Brien v. Vaill, 22 Fla. 627, 1 Am. St. Rep. 219, 1 South. 137. He is prima facie liable for the loss of goods of the guest: Bowell v. De Wald, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430. But see Meacham v. Galloway, 102 Tenn. 415, 73 Am. St. Rep. 886, 52 S. W. 859. When a traveler arrives at a depot and is met by the porter of an inn, who indicates to the traveler a conveyance in which he can go to the inn, and the traveler delivers to him his baggage or his check therefor, the traveler thereby becomes a guest of the inn so far as to render the proprietor liable for his baggage: Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491. The extent of innkeeper's liability is discussed in the monographic note to Clute v. Wiggins, 7 Am. Dec. 452-458.

FULGHUM v. J. P. WILLIAMS COMPANY.

[114 Ga. 643, 40 S. E. 695.]

MORTGAGE SALE OF PERSONALTY IN CUSTODY OF LAW.—If a chattel mortgagee, under a power of sale in the mortgage, advertises the property for sale, but prior to the sale and subsequently to the advertisement, the property is seized under an execution held by a third person, the sale passes no title. (pp. 49, 52.)

Jordan & Watson, W. L. Grice & Sons, and J. H. Martin, for the plaintiff.

Eldridge Cutts, contra.

643 LITTLE, J. Certain personal property, to wit, a horse, ten mules, wagons, harness, etc., was, on December 8, 1900, levied on by the sheriff of Pulaski county, as the property of G. R. Allison, to satisfy an execution in favor of Fulghum, administrator. J. P. Williams Company filed a claim to the property, and, issue having 644 been joined, evidence to the following effect was introduced. On the 30th of November, 1897, J. R. Allison & Co., J. R. Allison, and H. B. Moore executed a mortgage on the property levied on, in favor of J. P. Williams Company, to secure a number of promissory notes given by the mortgagors to the mortgagee. This mortgage contained a power giving to the mortgagee the right, in case of default in the payments of any of the notes named in the mortgage, to sell the property described, at the courthouse door in Hawkinsville, after posting a notice of sale for ten days at the courthouse door. The mortgage also recited that the mortgagee should be allowed to bid at the sale, and to purchase any or all of the property if the same should be sold. The proceeds were directed to be applied to the indebtedness of Allison & Co., and the surplus, if any, to be turned over to them. It was also stipulated that the sale of the property, under the power in the mortgage, might take place and be legal without carrying the property to the place of sale. It was shown that there was a default in the payment of the notes, and on November 27, 1900, the mortgagee through his attorney posted a notice of sale to take place December 8, 1900, in accordance with the terms of the mortgage, and the property was on that day sold in pursuance of that notice and purchased by the claimant. It further

appears that prior to this sale the sheriff of Pulaski county levied the fieri facias of the plaintiff in error upon this property and took the same into his possession, the levy having been made on the morning of the day that the sale was made by the mortgagee, and before such sale. Several months prior to the sale, still another execution had been levied on the same property, which was arrested by an affidavit of illegality, which was pending at the time the sale was made. It was further shown in behalf of plaintiff in fieri facias that the property was in possession of one of the defendants after the judgment on which his execution issued had been obtained. The sale by the mortgagee was regular in all respects, and in accordance with the power contained in the mortgage. Under this evidence the court directed a verdict finding the property not subject, which was accordingly returned by the jury. Plaintiff in fieri facias moved for a new trial, which was overruled, and he excepted. It was claimed in the motion for a new trial that the court erred in directing a verdict for claimant, and that the verdict so rendered was contrary to the evidence. An exception [645] was also taken to the exclusion of certain evidence, which, under the view we take of the law governing the case, it is not necessary to consider.

The claimant rested his title to the property on his purchase at the sale under the power contained in the mortgage; and the naked question is presented, whether under such a sale and purchase the claimant derived a valid title to the property. We think not. While freely admitting that under the proper exercise of a power of sale given in a mortgage, the title of the mortgagor is devested, and passes into the purchaser, there is one reason why the sale in the present instance did not have this effect under the circumstances which are shown to have existed at the time it took place. The effect of the mortgage was simply to create a lien on the property mentioned therein, in favor of the claimants, to secure the payment of their debt. It conveyed no title. Under an ordinary mortgage a valid sale of the mortgaged property could only have been had by a foreclosure in the methods pointed out by law, and a sale under the levy of the execution issued thereon. The power given by the mortgagor to the mortgagee to sell the property mortgaged, in case of default by the latter, is but a substitution by agreement of such method in lieu of the ordinary sale under foreclosure

(Mutual Loan etc. Co. v. Haas, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980), and we cannot imagine how a sale had under a power given in the mortgage is entitled to any more consideration or has attached to it incidents of a higher dignity than those which attach to a sale under foreclosure. As to the relative rights of third persons, we think they stand on the same footing. The evidence does not show that at the time the sale under the power took place the property had been delivered to the mortgagee. On the contrary, it shows that at the time of such sale the mortgagee was not in possession of the property, but that the same was in the possession of the sheriff who seized it under the levy made under plaintiff's execution. This court has more than once ruled that it was necessary for the full execution of the power of sale contained in a mortgage that the mortgaged (personal) property should be in the possession of the mortgagee so that he may fully effectuate the purposes of the sale by delivering possession to the purchaser. Here the property at the time of the attempted sale was in the possession of an officer of the court who had seized it to satisfy by execution sale a valid [646] judgment having a lien thereon. It was therefore in custodia legis, and, under the rule which obtains in such cases, the possession of the property by the sheriff who levied on it could not be disturbed by the levy of another process; and had the mortgagee in this case foreclosed his mortgage and placed it in the hands of the sheriff, possession of the property would have remained in that officer by virtue of the first levy. Mr. Freeman, in the second volume of his work on Executions, section 268, in treating of the effect of a levy upon property, says, on authority: "The lien of an execution gives the officer intrusted with its service no general or special property in the defendant's goods. But the moment that a levy is made the rights and remedies of the officer are materially changed; or, more accurately speaking, he, from that moment, is vested with rights and entitled to remedies to which he could before urge no valid claim. The officer is entitled to retain such possession and control of the property as may be necessary to make it productive under the writ. The law, therefore, concedes to him as to a bailee a special property in the goods in his custody. As against strangers to the title, the special property continues until the officer can redeliver the property to the defendant." The same author in the same section also

says that another consequence of taking property under an execution is that it is put in custody of the law, and cannot be levied upon by any officer, nor can it be replevied from the officer in whose charge it is, by the defendant, nor by anyone claiming title under him subsequently to the levy. For this proposition he cites Burkett v. Boude, 3 Dana, 213; Rives v. Wilborne, 6 Ala. 45; Kemp v. Porter, 7 Ala. 138; Langdon v. Brumby, 7 Ala. 53; Hartwell v. Bissell, 17 Johns. 128; Bilby v. Hartman, 29 Mo. App. 125, and other cases. The title upon which the claimant stood in the present case being derived from the defendant by virtue of the sale under the power given in the mortgage after levy of the execution by the sheriff, if the proposition laid down by Mr. Freeman be true, the claimant relying on such title could not have recovered the property levied on from the sheriff. It has frequently been ruled that money or property in the hands of an officer who has collected it under legal process is not the subject of attachment or of a levy, because it is in custodia legis: Hardy v. Tilton, 68 Me. 195, 28 Am. Rep. 34; Turner v. Fendall, 1 Cranch, 117. In Wiswall v. Sampson, 14 [647] How. 52, it was ruled that money in the hands of a receiver, being in custodia legis, is exempt from execution or attachment: Also, see Field v. Jones, 11 Ga. 413. The rule also embraces money in hands of certain trustees when appointed by the court: Bentley v. Shrieve, 4 Md. Ch. 412; and assignees in bankruptcy: Jones v. Gorham, 2 Mass. 375; and sheriffs: Wilder v. Bailey, 3 Mass. 289. It was ruled in Hackley v. Swigert, 5 B. Mon. 86, 41 Am. Dec. 256, that property in the custody of the law cannot be levied on, seized or sold under execution. In Wiswall v. Sampson, 14 How. 52, Mr. Justice Nelson, in delivering the opinion of the court, said, on page 68, "that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without leave of the court for that purpose." In the case of Corvell v. Heyman, 111 U. S. 176, 4 Sup. Ct. Rep. 355, it was ruled that: "The principle that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, applies both to a taking under a writ of attachment on mesne process and to a taking under a writ of execution." Mr. Justice Matthews, who delivered the opinion of the court in that case, said "that when property is taken and held under

process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject matter": See, also, Conner v. Long, 104 U. S. 228.

648 The principle which we rule as being applicable to the facts of this case under the above authorities is, that when the sheriff of Pulaski county, in obedience to the process, seized the property in question, no valid sale thereof could afterward, while the property was in the possession of the court under such seizure, be made under execution or otherwise, unless by leave or order of the court. And inasmuch as the sale under which the claimant derived his title in this case was made after seizure, and while the property was in the possession of the court by its officer, the purchaser took no title. It is not, of course, to be understood that the mortgagee, if he had a prior or superior lien to that of the judgment on which the execution issued, has not the right to enforce his lien, either against the property itself or the proceeds of the same under execution, and in the manner pointed out by our statute. The fact that the mortgage contained a power of sale does not render the exercise of that power the only method of enforcing the lien: McGuire v. Barker, 61 Ga. 339. Therefore, no substantial right of the mortgagee is denied by the ruling which is made. When a court having jurisdiction has by proper process taken property into its custody for the purpose of satisfying a judgment against the defendant in fieri facias, while any person having a lien on such property or interested in the proceeds thereof may rightfully come into the court having

possession of the property and assert his rights, yet he cannot disturb that possession, nor assert as to such property a title which he has acquired subsequently to the seizure. We are not now dealing with the lien which the claimant had to the property by virtue of his mortgage, but only with the title which he insists he has by virtue of the sale made by the mortgagee after the levy. We think he took nothing by that sale, and that the trial judge erred in directing a verdict in his favor.

Judgment reversed.

All the justices concurring.

Property in the Custody of the Law is not subject to attachment or execution: Brewer v. Hutton, 45 W. Va. 106, 72 Am. St. Rep. 804, 30 S. E. 81; Allen v. Gerrard, 21 R. I. 467, 79 Am. St. Rep. 816, 44 Atl. 592; Hill v. Hatch, 99 Tenn. 39, 63 Am St. Rep. 822, 41 S. W. 349. If property in the custody of the law is levied upon and sold under execution, the purchaser is a purchaser pendente lite: Hackley v. Swigert, 5 B. Mon. 86, 41 Am. Dec. 256.

SMITH v. PEACOCK.

[114 Ga. 691, 40 S. E. 757.]

GIFT — REVOCATION. — ONE WHO PLACES MONEY WITH ANOTHER to deliver to third persons as a gift may, before the delivery and acceptance thereof, revoke the agency he has created, and terminate the right to hold the money for the purpose of distributing it to the intended donees. (p. 56.)

GIFT—WHEN INCOMPLETE—REVOCATION.—If one delivers money to another with instructions to give designated amounts to certain persons, and to invest a part of the balance in lands and have the titles thereto made to minor children of the person to whom the money is delivered, the gift to the minors, as to any portion of such balance not so invested, is incomplete, and the owner may reassert title thereto. (p. 58.)

AN EXPRESS TRUST CANNOT BE CREATED BY PAROL in Georgia. (p. 59.)

ERROR IN IMPANELING A JURY IS IMMATERIAL, if the verdict directed by the court is the only outcome of the case legally possible. (p. 59.)

James Bishop, Jr., E. Herrman, W. M. Morrison, and E. B. Milner, for the plaintiff in error.

Hall & Wimberly, J. E. Wooten, and W. M. Clements, contra.

[692] FISH, J. Samuel G. Graham brought an action of trover and bail against Ben. W. Smith, to recover nineteen hundred and twenty-six dollars and forty-three cents, lawful money of the United States, consisting of described treasury notes, national bank notes, gold certificates, silver certificates, gold coins, silver coins, and "pennies." While the case was pending in court the plaintiff died, and, at the term at which the case was tried, L. M. Peacock, the administrator upon his estate, was made plaintiff in his stead. The defendant, in his original answer, denied "that plaintiff claims title to or is the owner of any money or property in the possession of defendant," and denied "that plaintiff has any right to recover the money for which this action is brought." On the trial, upon the close of the evidence, the defendant amended his answer by alleging that the plaintiff "in his lifetime gave and delivered to defendant the money sued for, with other money, aggregating altogether three thousand dollars or a little more, with instructions to afterward give and deliver one thousand dollars of said money to Mrs. Elizabeth Mullis, daughter of said S. G. Graham, and seven hundred dollars to Duncan Graham, son of said S. G. Graham, and to keep the remainder of said money and invest the same for the benefit of the children of this defendant, great-grandchildren of said S. G. Graham, and five hundred dollars of the money given defendant for his said children was in fact invested in land for one of defendant's children in pursuance of said gift." Plaintiff's counsel then made a motion for the direction of a verdict in favor of the plaintiff. The court sustained this motion, [693] over the objection of defendant's counsel, "and instructed the jury to render a verdict in favor of the plaintiff for the sum of nineteen hundred and twenty-six dollars and forty-three cents," which verdict was accordingly returned by the jury, and judgment duly entered up thereon. Thereupon the defendant excepted and brought the case here for review.

Most, if not all, of the exceptions to the rulings of the court upon the admission or the rejection of evidence are clearly without merit, and none of them, in the view which we take of the case, need be further considered; for we shall base our decision upon the assumption that the testimony of the defendant himself, in reference to the circumstances under which and the manner in which he obtained possession of the money in controversy, is absolutely true. The theory of the plaintiff was that something over three thousand one hundred dollars,

belonging to Samuel G. Graham, and which he had kept in a box under his bed, had been stolen and secreted by the defendant, and that the identical money described in the petition was a part of the money so stolen and secreted, which had been subsequently ascertained to be in his possession. The theory of the defendant was that this box with its contents, amounting to something over three thousand and eighty-seven dollars, was delivered to him by Samuel G. Graham, accompanied by the instructions in reference to the disposition of the money set up in the defendant's amended plea. According to the defendant's own testimony, the money which was found to be in his possession was a portion of the money which he so received from Graham. He explained how he obtained possession of the box of money as follows: "I was pulling fodder there at Mr. Joe Graham's, and they wanted to take the money and bring it and put it in the bank, and he [Samuel G. Graham] said that he had rather lose every cent of it than for them to go there and get it and put it in the bank, and he said that if John and Joe took it and carried it to the bank that it would never do anybody any good but them, and he was not going to give them a cent of it. He said that Duncan could get the place and get along very well, but said that Elizabeth was the only daughter he had, and she was not in as good circumstances as the rest, and he thought he would help her more than any of them. He told me to take this box and carry it to a good secret place, and as soon as I got a chance he wanted me to slip Duncan seven hundred dollars, and he wanted Elizabeth to have one thousand dollars of it; then he said the balance of 694 this money he wanted me to put part of it in land and have the deeds drawn to my little motherless children; and he asked me if I would do this myself, and I told him that I would. I told him that he knew that John and Joe would be mad with me about it, and he said he would never let them know it; he said that nobody would know about it but himself, and it was not necessary for them to know anything about it. He told me that he wanted me to take the money, and, just as soon as I could, to give Duncan and Elizabeth their part, and he said, if I didn't get a chance before, for me to bring Elizabeth her part over there." This testimony was in direct and irreconcilable conflict with the testimony of Samuel G. Graham, taken and preserved in a set of interrogatories and answers which were introduced in evidence by the plaintiff, which was strongly supported by various facts and circumstances de-

veloped upon the trial. But, as already intimated, we do not consider it necessary to consider any evidence in the case which conflicts with the defendant's own testimony.

1. So dealing with the case, it appears that old man Graham turned over to the defendant something over three thousand dollars, with instructions to deliver one thousand dollars to the owner's daughter, Mrs. Mullis, and seven hundred dollars to his son, Duncan Graham, and to invest a part of the balance in lands for the benefit of the defendant's little children, taking the deeds thereto in the names of such children. The defendant, by his own testimony, showed that he had not delivered any part of the money to Mrs. Mullis or to Duncan Graham. Moreover, neither of them ever made any claim whatever to any part of it, and they both were introduced and testified as witnesses for the plaintiff. Therefore neither of the intended gifts of their father to them had gone into effect. Neither Mrs. Mullis nor Duncan Graham had accepted the intended gift, and there had been neither actual nor constructive delivery of any portion of the money to either of them. "To constitute a valid gift, there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by the law in lieu thereof": Civ. Code, sec. 3564. "Actual manual delivery is not essential to the validity of a gift. Any act which indicates a renunciation of dominion by the donor, and the transfer of dominion to the donee, is a constructive delivery." So far as the portions of the money which the defendant [695] was instructed to deliver to these two intended donees were concerned, the gifts were incomplete for the want of the essential elements of delivery and acceptance, and the money was still in the possession of the defendant, as the agent of Samuel G. Graham, who had the right to revoke the agency which he had created, and terminate the right of the defendant to hold the money for the purpose of distributing it to the intended donees.

In Trustees of Howard College v. Pace, 15 Ga. 486, "the main question arose thus: Alfred H. Worthy gave to the trustees of Howard College his promissory note for five hundred dollars. Mary Worthy, by parol, assumed to pay this note; the trustees brought an action of assumpsit, etc., against Davis Pace, alleging that Mary Worthy had deposited or paid money to said Pace, with which to pay this note. Counsel for Pace demurred to the declaration. The court sustained the demurrer, and this [was] assigned as error." This court sustained

the judgment of the lower court, Benning, J., saying in the opinion: " 'Where money is paid by A into the hands of B, to remain at the disposal of C, the right to that money continues in A until B gives and C takes credit for it, or B actually pays it to C; up to this period, B is the agent of A only, and A may countermand the authority to make the payment, in the same manner as a person who sends another to pay money may stop him before he arrives at the place where it is to be paid, and require him to deliver it back': Best, C. J., in Gibson v. Minet, 9 Moore, 36; Turberville vs. Porter, Dyer, 49a, note 10; Wheatley v. Low, Cro. Jac. 668. And if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee: Lyte v. Perry, Dyer, 49a, 49b, note 7; Taylor v. Lendley, 9 East, 54." In the case here cited from Dyer (which should be Lyte v. Peny), it was held: "If a man bail money to another, to the use of a third, and to be delivered on the day of marriage, he may countermand it any time before delivery over." In the case cited from East it was held: "One who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master [696] of the workhouse for the use of the poor, may, at any rate, countermand the application of the money before it is so applied, and may recover it back in an action for money had and received."

In Burke v. Steel, 40 Ga. 217, Steel, who was employed by Burke at a salary of one hundred dollars per month, directed Burke to pay twenty-five dollars per month of his salary to Kay, for the benefit of Kay and his wife and children, as a donation or gift from him to them. Burke retained the twenty-five dollars per month from Steel's salary, but failed to pay it to Kay, as directed. It was held that Steel might recover the money from him by suit in his own name. McCay, J., said: "This case comes within the case of Trustees of Howard College vs. Pace, 15 Ga. 486. This was a direction of Steel to Burke to pay Steel's money to a third person. Before Burke does it, or puts himself in such relation to the third person as that he cannot draw back, Steel reasserts his own rights. It was a parol gift, without delivery, and revocable at Steel's option."

2. It is contended by counsel for the plaintiff in error that, whether the gifts to Mrs. Mullis and Duncan Graham were complete or not, there was a complete gift as to so much of the money as the defendant was to invest in land for the benefit of his little children. This contention is based upon the theory that this money was given by Samuel G. Graham to the defendant for the latter's children, and that, these children being minors, their father had the right to accept the gift for them, and did so accept it. In our opinion, this contention is not tenable. Granting that Graham intended to make a gift of money, and not of land, to these children, and that the defendant, acting for his children, intended to accept the same for them, still the gift was incomplete because of its indefiniteness and uncertainty. According to the defendant's testimony, he was instructed by Graham, the owner of the money, to take the entire fund turned over to him and to deliver one thousand dollars to Mrs. Mullis and seven hundred dollars to Duncan Graham, and to invest a part of the balance in land, taking the deeds in the names of the defendant's little motherless children. Can any man say what part of the balance remaining after deducting seventeen hundred dollars from the entire sum was to be invested in land for the defendant's children? A gift stands upon the footing of an executed contract, and, as in the case of a contract, there must be an identification of its subject matter. Here it is impossible to say how much money Graham intended to [007] give to these children, for clearly he did not intend to give to them all of such balance. If it be said that he intended to give them so much of the balance remaining, after giving one thousand dollars to Mrs. Mullis and seven hundred dollars to Duncan Graham, as the defendant should invest in land for his children, then, until the defendant should make such investment, the amount of money which the donor intended to give the children would be unascertained and unascertainable. We are clearly of opinion that there was no complete gift to the children when the defendant obtained possession of the money; and whatever may be the law with reference to the status of the five hundred dollars which the defendant did invest in land—taking the deed in the name of one, and not all, of the children—it seems perfectly plain that as to the money which he had not invested in land the gift intended by Graham was incomplete. Certainly, there could be no gift from Graham to these children until an investment had been made in land for their benefit, and then

the gift would not include any money not so invested. Taking the defendant's testimony to be true, he was simply the agent of Samuel G. Graham, intrusted as such with a sum of money, amounting to about three thousand and eighty-seven dollars, for certain specified purposes, viz., to deliver one thousand dollars to Mrs. Mullis and seven hundred dollars to Duncan Graham, and to invest a portion of the balance in land for his children. Before he had carried out old man Graham's intentions with reference to either of the intended gifts—with the possible exception of the five hundred dollars invested in land for one of the children—the prospective donor reasserted his title thereto and effectually revoked the agency.

3. Neither the counsel for the plaintiff in error nor the counsel for the defendant in error contended before this court that the testimony of the defendant below, if true, showed the creation of an express trust, in which the defendant was the trustee for the beneficiaries thereof. On the contrary, both sides contended that this testimony did not show the creation of an express trust. But as much has been said, in the argument and briefs of counsel, upon the question as to whether this testimony showed the creation of such a trust, we will simply say that no express trust was created, for the sufficient reason, if for no other, that, since the adoption of the code, no express trust can be created by parol in this state: Civ. Code, sec. 3153. We might add, also, that what we have said in reference to the indefiniteness and uncertainty of the subject 698 matter of the alleged gift to the defendant's children, rendering the same incomplete, would apply equally as well if the alleged gift were to him in trust for them; the gift to the trustee would be incomplete for the same reason.

4. Applying the rules announced above to that view of the evidence most favorable to the defendant, the court, as we have already seen, committed no error in directing the verdict which the jury returned, the five hundred dollars invested in land not being included therein.

5. Complaint is made in the bill of exceptions that the court, in purging the jury, upon motion of plaintiff's counsel, excluded therefrom a certain juror, upon a ground which did not render such juror disqualified to sit upon the trial of the case. We do not deem it necessary to consider this question, for the reason that the verdict directed by the court was the only outcome of the case legally possible, and, therefore, any error in impaneling the jury was immaterial. The verdict being prop-

erly directed by the court, it mattered not who composed the jury.

Judgment affirmed

All the justices concurring.

A Gift Inter Vivos must be complete. The donor must devest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee: Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836. There must be a delivery, actual or constructive: Holmes v. McDonald, 119 Mich. 563, 75 Am. St. Rep. 430, 78 N. W. 647; or an express declaration of trust in the donee's favor: Getchell v. Biddeford Sav. Bank, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895. A gift may be effected by placing money with a third person to be delivered by him to the intended donee: Note to Ray v. Simmons, 23 Am. Rep. 452.

Parol Trusts in personal property may be created: Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382, and note, 33 Atl. 836.

JACKSON v. STATE.

[114 Ga. 826, 40 S. E. 1001.]

ROBBERY.—THE MEANING OF THE PHRASE "FROM THE PERSON OF ANOTHER," embraced in the definition of robbery, is, not that the taking must be from the actual contact of the body, but if it is from under the personal protection, that will suffice. (p. 61.)

ROBBERY.—WHAT IS NOT.—SNATCHING UP a revolver lying in close proximity to the owner, presenting it at him and his wife to deter their attempting to recover it or give pursuit, and carrying it away with intent to steal, is not robbery. (p. 62.)

C. A. Picquet, for the plaintiff in error.

J. S. Reynolds, solicitor general, contra.

826 LUMPKIN, P. J. The evidence in this case warranted a finding of the following facts: Jackson, the plaintiff in error, entered the residence of Cadle, ostensibly for the purpose of purchasing a watch, and examined several which were exhibited to him. It was then discovered by Cadle and his wife that one of the watches was missing. After ascertaining this fact, Cadle, who was a cripple, presented a pistol at Jackson, and Mrs. Cadle began a search of his person for the missing watch. Cadle laid the pistol on the bed and himself undertook to ascertain if Jackson had the watch concealed upon his per-

son. Thereupon the latter suddenly picked up the pistol, pointed it at Cadle and his wife, and in this manner effected his escape. They were taken utterly by surprise when Jackson "grabbed the pistol," for "it was done so quick [they] couldn't hardly say nothing"—as was stated by Mrs. Cadle in her testimony on the trial. The pistol was not recovered. Jackson was indicted for robbery. The indictment contained two counts. In the first it was charged that the accused did by force and intimidation take from the person of Cadle a described watch, with intent to steal the same. The charge in the second count was that by force and intimidation the accused took from the person of Cadle a certain pistol, with intent to steal the same. The jury returned a verdict finding the accused "guilty of robbery by force, on second count." The case is here upon a bill of exceptions assigning error upon the refusal of the court below to grant a new trial, and turns upon the question whether or not the conviction can lawfully stand upon the state of facts outlined above. We are of the opinion that it cannot.

[827] It is undoubtedly well settled that the meaning of the phrase, "from the person of another," embraced in the definition of robbery set forth in the Penal Code, section 151, is, "not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection, that will suffice": See Clements v. State, 84 Ga. 660, 665, 20 Am. St. Rep. 385, 11 S. E. 505, and authorities cited. If, therefore, while the pistol was lying on the bed in close proximity to the person of Cadle, he had been put in fear by Jackson, and while under the influence of this fear, and being thus rendered incapable of resisting the taking of the pistol by Jackson, the latter had seized it and carried it away with intent to steal the same, he would have been guilty of robbery by intimidation; for, in legal contemplation, the pistol, under such circumstances, would by intimidation have been taken from the person of Cadle. The present conviction cannot, however, stand upon this theory. In the first place, it does not appear that Jackson obtained possession of the pistol by intimidating Cadle; and in the second place, the verdict does not find that Jackson did so. In order, then, to uphold this verdict, it would be necessary for us to decide, as we do not feel authorized to do, that there was testimony showing that Jackson took the pistol animo furandi and by force. There was no evidence that he resorted to any force whatever in getting possession of

the pistol. It will, of course, be understood that we here use the word "force" in the sense in which it is employed in the definition of robbery. There was no struggle over the pistol between the accused and Cadle. On the contrary, it seems clear that Jackson merely picked up the pistol, deftly and suddenly, and walked off with it, covering his retreat by a show of force in presenting the pistol at Cadle and his wife with a view to deterring them from attempting to recover the same or to give pursuit. The case therefore falls squarely within the principle laid down in Spencer v. State, 106 Ga. 692, 32 S. E. 849, in which it was held that: "Suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner or injury to his person, does not constitute robbery." The opinion of Mr. Justice Fish filed in that case presents an elaborate discussion of the question under consideration, and a number of pertinent authorities are cited in support of the ruling therein announced.

Judgment reversed.

All the justices concurring, except Little, J., absent.

To Constitute Robbery, there must be force or intimidation, asportation without the consent of the owner, and an intent to steal: Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628. It is not necessary, however, that the property should be taken actually from the person of the owner: Clements v. State, 84 Ga. 660, 20 Am. St. Rep. 385, 11 S. E. 505; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628; State v. Calhoun, 72 Iowa, 432, 2 Am. St. Rep. 252, 34 N. W. 194. The mere sudden taking or snatching of property from the person of another does not constitute robbery. But if violence is done to his person at the time, the taking is robbery. And when resistance is prevented by threats of violence, creating a reasonable apprehension thereof, the snatching becomes robbery, though it does not if the putting in fear is after the taking: See the monographic note to State v. McCune, 70 Am. Dec. 184, 185.

GRAVITT v. STATE.

[114 Ga. 841, 40 S. E. 1003.]

BURGLARY.—RECENT POSSESSION OF THE STOLEN PROPERTY by one accused of burglary, not satisfactorily explained, is a circumstance upon which the jury is authorized to infer his guilt. But it does not create a presumption of law against him, and is not of itself conclusive. (p. 63.)

BURGLARY.—A VERDICT OF GUILTY OF BURGLARY IS UNWARRANTED if the evidence, when viewed most strongly against the accused, only authorizes the inference that he is guilty of receiving stolen goods. (p. 64.)

H. H. Dean, for the plaintiff in error.

W. A. Charters, solicitor general, contra.

841 LEWIS, J. The accused was tried in the superior court of Hall county, upon an indictment charging him with burglary, and was convicted. He made a motion for a new trial, which was overruled, and he excepted.

1. The court charged the jury, in effect, that where a breaking and larceny have been shown, recent possession of the stolen property 842 by one accused of the burglary, not explained to the satisfaction of the jury, would be proof of his guilt; that while possession satisfactorily explained would create no presumption against the accused, "if he fails to account for it to the satisfaction of the jury, the law presumes he is the guilty party." This charge states too broadly the rule applicable to recent possession of stolen property, and was error manifestly prejudicial to the accused. It is true, as has been repeatedly ruled by this court, that such possession, unexplained, or not satisfactorily explained, is a very strong circumstance, upon which the jury will be authorized to infer the guilt of the accused. But to charge that this circumstance creates a presumption of law that the one so found in possession of stolen property is guilty of the theft thereof, and is of itself proof of guilt, is to compel the jury to do that which they are merely permitted by law to do. The presumption is one of fact, and not of law. There is nothing in what is here laid down which conflicts with the case of Jones v. State, 105 Ga. 650, 31 S. E. 575; for while it is there stated as a general rule that the recent, absolute, and unexplained possession of stolen goods raises a presumption of the guilt of the person having such possession, the greatest length to which the rule is carried is

that it is sufficient to warrant the conviction of the accused, and at another point in the opinion the following language is used: "It is true that the possession of goods stolen at the time of the commission of a burglary is but a circumstance. If it is recent, it is, when unexplained, a very strong circumstance tending to show the guilt of the possessor, and it is sufficient to put the burden of explaining the possession on the person charged with the offense." In Lester v. State, 106 Ga. 372, 32 S. E. 335, the rule is stated in the following language: "If one be found in the recent possession of goods shown to have been stolen from the house at the time of the breaking and entering, such possession is sufficient to connect the person in possession with the perpetration of the offense. But it is not of itself conclusive": See, also, Turner v. State, 114 Ga. 425, 39 S. E. 863.

2. It appears that another person than the accused, one Cruse, has been convicted of the same burglary as that with which Gravitt was charged. There is nothing in the evidence to connect Gravitt with the breaking and entering of the store of the prosecutor as charged in the indictment, either as principal or as an accessary of Cruse. Viewed most strongly against the accused, the evidence [843] only authorized the inference that he was guilty of receiving stolen goods. The verdict finding him guilty of burglary was therefore unwarranted, and should have been set aside on motion for new trial.

Judgment reversed.

All the justices concurring, except Little, J., absent.

The Recent Possession of Stolen Property is evidence that the person stole it or received it knowing it to be stolen, and when unexplained is sufficient to warrant a conviction: State v. Guild, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909. The possession alone, however, raises no presumption either of law or fact which the court may declare to the jury, but is only circumstantial evidence of guilt: See the monographic note to Hunt v. Commonwealth, 70 Am. Dec. 448. Mere possession of goods recently stolen from a burglarized house is not of itself evidence tending to show, as a matter of law, that the possessor is guilty of larceny; nor is mere possession, in connection with other incriminating circumstances, sufficient, as a matter of law, to show guilt or even raise a presumption of guilt of either the larceny or the burglary: State v. Gillespie, 62 Kan. 469, 84 Am. St. Rep. 411, 63 Pac. 742.

KIRKSEY v. ROWE.

[114 Ga. 893, 40 S. E. 990.]

EXEMPTIONS.—A HORSE USED IN DRAWING A DRAY and not worth over forty dollars, comes within the term "farm horse," as used in the Georgia exemption statute, notwithstanding his employment may be urban, rather than rural, in character. (p. 66.)

EXEMPTIONS.—A HALF INTEREST IN A TWO-HORSE WAGON cannot be exempted as a "one-horse wagon." (p. 66.)

EXEMPTION OF TOOLS.—A SET OF HARNESS does not fall within the words "common tools of trade," as used in an exemption statute. (p. 66.)

Hudson Moore and E. E. Pomeroy, for the plaintiff.

Reynolds v. McGill, for the defendant.

894 LUMPKIN, P. J. The bill of exceptions in the present case assigns error upon the refusal of the judge of the superior court to sanction a petition for certiorari. The correctness of this action on his part depends upon whether or not any one or more of the items of property below mentioned can be lawfully exempted under the Civil Code, section 2866, viz., a horse, the value of which does not exceed forty dollars, used by the head of a family in running a dray for the support of himself and family, a half interest in a two-horse wagon, and a set of harness. Under the section just cited, every debtor who is the head of a family may have exempted from levy and sale "one farm horse or mule," "one one-horse wagon," and the "common tools of trade of himself and wife."

1. A horse of the character and value above described may, under this section, be exempted, though not actually used upon a farm. The exemption is not allowed exclusively to agriculturists, but to "every debtor who is the head of a family." The descriptive word "farm" was evidently intended to apply to quality and restrict value. It was not used with a view to prescribing the kind of work in which the exempted animal was to be employed. By the act of December 11, 1841, every head of a family was entitled to have exempted "one horse or mule, the value of which [should] not exceed fifty dollars": Cobb's Digest, 389, 390. When the first code was prepared, the words limiting the value of the animal were omitted, and the word "farm" introduced, and the law has thus remained

until the present day. Doubtless the codifiers and the general assembly were of the opinion that the limitation as to value was too restrictive, and the above-noted change in the law was made for the purpose of allowing the exemption of an ordinary horse or mule such as is commonly employed upon a farm, though its value might exceed the amount specified in the act of 1841. [895] Certainly, a horse used in drawing a dray, and not worth over forty dollars, may properly be regarded as coming within the descriptive term "farm horse," notwithstanding his actual employment may be urban rather than rural in character.

2. We agree with his honor of the trial bench in holding that a half interest in a two-horse wagon cannot be exempted as "one one-horse wagon." No amount of reasoning can alter the fact that a half interest in a two-horse wagon is not "one one-horse wagon," nor, indeed, a wagon of any kind.

3. We are also of the opinion that it was rightly adjudged by his honor below that a set of harness, whether double or single, does not fall within the descriptive words "common tools of trade." As a general rule, words used in a statute should be given their ordinary signification: Pol. Code, sec. 4. In Black's Law Dictionary, 1178, it is said: "The usual meaning of the word 'tool' is 'an instrument of manual operation'; that is, an instrument to be used and managed by the hand instead of being moved and controlled by machinery." In English's Law Dictionary, 784, we find the following definition of the word "tool": "An implement used by the hand in working. A hand instrument necessary to one's trade." According to Bouvier, this word, as used in exemption laws, "includes any instrument necessary for the prosecution of trade": 2 Bouvier's Law Dictionary, 1124. The author cites a number of cases in which such articles as sewing-machines, pianos, violins, cornets, guns, etc., have been held to be tools within the meaning of exemption statutes: See, also, Cycl. Law Dic. (Shumaker & Longsdorf), 914; Anderson's Law Dictionary, 1039; 2 Abbott's Law Dictionary, 572. In each of the works last mentioned there are numerous citations of decisions as to what do or do not constitute tools under various exemption laws. Some of these decisions evidently go further than our statute would authorize, in classifying as tools articles which are more properly designated as appliances or machines. That the word "tool" was intended to have a more restricted interpretation in Georgia is evidenced by the fact that under

our law looms, spinning-wheels, cotton-cards, and sewing-machines are specially exempted. Such articles, under some of the decisions above referred to might be regarded as mere tools. In the case of Lenoir v. Weeks, 20 Ga. 596, in which it was held that the "act of 1822, exempting 'the common tools' of the debtor's trade from levy and sale under execution, [did] not extend 896 to a lawyer's library," Judge Lumpkin said (page 597): "The word 'tool' is defined to be some simple instrument used by the hand, and the object of the legislature evidently was to exempt articles of small value and of frequent and daily use by a poor mechanic upon whose manual occupation of these tools his family depended for a subsistence. It was never intended that the debtor should be protected in carrying on an extensive trade with a large capital, even in tools, while his creditor was suffering for the money justly due him. What are the other articles protected by the act? Two beds and bedding, common bedsteads, a spinning-wheel and two pair of cards, a loom and a cow and calf, common tools of his trade, and ordinary cooking utensils. Did the legislature intend to depart so far from the strict and appropriate meaning of the term 'common tools' as to extend it to all the utensils of a distillery, the looms, spindles, etc., of a cotton or woolen factory, the forges and other instruments of a manufactory of iron, and other complicated and expensive machinery costing thousands of dollars? No such construction can be adopted without doing violence to the meaning of the act." Whether a set of harness actually used in connection with a one-horse wagon can be exempted as a thing necessarily incidental to the use of the vehicle is not now decided.

We reverse the judgment complained of in the present case solely because of the erroneous ruling with respect to the exemption of a horse such as that referred to in the first division of this opinion.

Judgment reversed.

All the justices concurring, except Little, J., absent.

Exemptions are Liberally Construed in favor of those claiming their benefit: Morgan v. Roundtree, 88 Iowa, 249, 45 Am. St. Rep. 234, 55 N. W. 65; Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459, 34 Pac. 1020; Rustad v. Bishop, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 440. But only those articles specified in a statute can be held as exempt: Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657. As to what are tools and implements of trade within the meaning of exemption statutes, see the monographic note to Kilburn v. Demming, 21 Am. Dec. 545-554.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY v. CALUMET STOCK FARM.

[194 Ill. 9, 61 N. E. 1095.]

NEGLIGENCE — PLEADING. — GROSS NEGLIGENCE against a railway company may be proved under an allegation of negligent, willful and reckless misconduct on its part. (p. 69.)

CARRIERS — CONTRACT LIMITING LIABILITY — ASSENT OF SHIPPER.—If a contract limiting the liability of a common carrier is contained in a bill of lading which, in its entirety constitutes both a receipt and a contract, it is not binding upon the shipper unless assented to by him. (p. 71.)

CARRIERS.—THE BURDEN OF PROOF IS UPON a carrier to show the assent of a shipper to a stipulation in a bill of lading limiting the former's liability. (p. 71.)

CARRIERS—CONTRACT LIMITING LIABILITY—QUESTIONS NOT REVIEWABLE ON APPEAL.—Whether a shipper assented to limitations of liability contained in a bill of lading, and whether the negligence causing the injury complained of was gross, are questions of fact conclusively settled by the judgment of the trial court, and cannot be reviewed on appeal. (p. 71.)

CARRIERS—LIMITATIONS ON POWER TO LIMIT LIABILITY.—A common carrier cannot, even by express contract, exempt itself from liability resulting from gross negligence or willful misconduct committed by itself or its servants or employés. (pp. 71, 72.)

EVIDENCE—EXPERTS, WHO COMPETENT TO TESTIFY TO VALUE.—Persons engaged in buying, selling, and handling racehorses, and who had seen certain racehorses injured while in the hands of a common carrier, frequently upon the racetrack and in races before their injury, and knew their speed and quality, are competent to testify to the value of such horses immediately before and subsequent to such injury. (p. 73.)

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — A new trial cannot be awarded on the ground of newly discovered evidence, which is cumulative or by way of impeachment merely, and in its nature is not conclusive. (p. 73.)

Botsford, Wayne & Botsford, for the appellant.

Aldrich & Worcester and J. F. Snyder, for the appellee.

[10] HAND, J. This is an action brought against the appellant for an alleged injury to three horses of appellee, caused by an accident to the car in which they were being shipped from Geneva, Illinois, to Fort Wayne, Indiana. The declaration contained two counts. One charges negligent and the other willful and reckless misconduct on the part of appellant. The general issue was filed, and on the trial the jury returned a verdict for fifteen hundred dollars, and a judgment was rendered against appellant for that amount, which has been affirmed by the appellate court for the second district, and a further appeal has been prosecuted to this court.

The evidence introduced on behalf of appellee tended to show that on August 10, 1893, it delivered to appellant, at Geneva, Illinois, three horses, viz., Roy Wilkes, Nutonian, and Lady Roy, which were valuable for racing purposes, to be transported from that place, by way of Chicago, to Fort Wayne, Indiana; that the horses were [11] put on board a stock-car, which, after it had reached Chicago, was set out of the train to which it had been attached and was standing in appellant's yard, and that a train, in backing up to connect with the car, struck the car with great force, and that the horses were thrown down and injured. There was a conflict in the evidence as to whether the car, at the time of the accident, was in the yard of the defendant or the yard of the Pan Handle road, and as to whether the horses were injured at the time of said accident.

It is first contended by appellant that as the declaration charges willful and reckless negligence in causing the accident, such negligence must be proven to sustain the action. Under this declaration, which charged appellant with negligent, willful, and reckless misconduct, there is no question but what appellee had the right to prove gross negligence; but were the contention of appellant correct, we are of the opinion the jury would have been justified in finding that the evidence showed the car containing said horses was handled in a willful and reckless manner. William Monteith, a groom who was on the

car, testified: "It was dark. We went in the yards at Chicago; lay there a couple of hours; made a flying switch and struck our car. The draw-bar was broken. When the car struck, I was on my knees changing the mare's bandages. I was thrown on my back. The lantern was knocked over; set fire to the straw. Roy Wilkes was at one end of the car. The horses were tied. When the car struck, halters were broken. The jolt of the car threw the horses down. The mare was down when I saw her. She fell down. When she came up, she struck her head against the car. Nutonian went down. Made three attempts before he got up. He was strained across his loins. He tried to get up, and could not, until I lifted him. Roy Wilkes went down. We did not get out of the Chicago and Northwestern yards until the following night. They were fixing the car." F. H. Wardlow, who was in [12] the car, testified: "The accident was in the Northwestern yards. I was sitting in the car door. Roy Wilkes stood back and the other two horses stood in front, in the front end of the car. The car struck the side where Roy Wilkes was standing. It knocked me out of the door. When I looked in the car he was standing on his haunches. The other two horses, one was lying on top of the other. The lantern Monteith had was knocked down. One of the doors struck the trotting sulkey and smashed one wheel. Saw the next morning the draw-bar had been smashed." Kelley Freshwater, who was also in the car, testified: "The car hit the train hard, bounded back, put our lanterns out, knocked things down, threw down the door on the south side of the car. Roy Wilkes kind of tripped and fell. His head struck the water bucket. The horses kind of jumped up in the air, broke their halters, and Roy Wilkes struck his head with terrible force on the outside of the car. It was dark. Monteith went for a light. We gathered up the lanterns. Roy Wilkes was standing in the middle of the car, and the other two horses on either side, with their halters broken. Trunks were slewed around—the big chest turned around more than it was. Roy Wilkes had some hard knocks on the side of his head. Lady Roy had a little cut which she got from the trunk. Nutonian had a cut on the ankle that he got from struggling in the accident."

It is next contended that the horses were shipped under a contract which limited the liability of the appellant to the sum of one hundred dollars for each horse and to injuries which

occurred upon its own line. The contract limiting the liability of the appellant is contained in a bill of lading which, in its entirety, constitutes both a receipt and contract, and is not binding upon the appellee for two reasons: 1. There is no evidence in the record that the appellee assented thereto; and 2. Appellant cannot relieve itself, by contract, for an injury caused by its gross negligence. Furthermore, the questions of such [13] assent and negligence are questions of fact which have been determined adversely to the appellant both by the trial and appellate courts: Chicago etc. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596; Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417. In Chicago etc. Ry. Co. v. Simon, 160 Ill. 653, 4 N. E. 597, we say: "Where a contract limiting the liability of the carrier is contained in a bill of lading which, in its entirety, constitutes both a receipt and contract, the onus is on the carrier to show the restrictions of the common-law liability were assented to by the consignor: Field v. Chicago etc. R. R. Co., 71 Ill. 458; Boscowitz v. Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191. And whether there is such assent is a question of fact. The mere receiving the bill of lading, without notice of the restrictions therein contained, does not amount to an assent thereto: United States Exp. Co. v. Haines, 67 Ill. 137; Anchor Line v. Dater, 68 Ill. 369; American Merchants' etc. Exp. Co. v. Schier, 55 Ill. 140; Merchants' Dispatch Transp. Co. v. Joesting, 89 Ill. 152; Erie etc. Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51. In this case, whether the limitation in the bill of lading was assented to by the consignor was a question of fact determined by the appellate and trial courts adversely to appellant, and no question of law is presented in this court under which those questions of fact are before us." And in Chicago etc. Ry. Co. v. Chapman, 133 Ill. 107, 23 Am. St. Rep. 591, 24 N. E. 418, it is said: "A common carrier cannot, even by express contract, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants or employés. Whatever may be the rule elsewhere, in this state the common carrier cannot contract for exemption from responsibility for a failure on its part, or that of its servants, to exercise ordinary care in the transaction of its business. If the carrier may by contract limit its liability for gross negligence or willful misfeasance to any extent, it may contract for total exemption. A contract for exemption [14]

from liability for its torts being void, as against public policy, it cannot shield itself as to any portion of the damages to person or property occasioned by its gross negligence or willful misconduct. As we have seen, it may protect itself against fraud by requiring the consignee to state the value of the thing shipped; but when it receives property for transportation it must exercise reasonable care until it reaches its place of destination, and will not be permitted to absolve itself from that responsibility."

The court gave to the jury, upon behalf of the appellee, the following instruction, which the appellant claims was reversible error: "The court instructs the jury that if you find for the plaintiff in this case, that in estimating the plaintiff's damages you have a right to take into consideration the difference in the fair market value of the horses in question, and each of them, at the time of the shipping of said horses from Geneva, Illinois, to Fort Wayne, Indiana, and their fair market value after the injury complained of, as shown by the evidence in this case, and also whatever sum or sums of money the evidence shows the plaintiff paid out in endeavoring to cure said horses, or either of them, from the injuries complained of, and all loss sustained by the plaintiff by reason of such injury, if any such loss is shown by the evidence in this case, not exceeding the value of said horses, and not exceeding the amount claimed in the plaintiff's declaration."

The criticism made upon this instruction is, that it does not limit the market value of said horses to the time immediately before and after said injury, and assumes that the appellee has been put to expense in endeavoring to cure said horses from the injury complained of. The instruction, in case the jury find for the appellee, clearly limits the market value of the horses to the time immediately preceding and following the injury, and confines the jury to such expenses as the evidence shows the [15] appellee to have incurred in endeavoring to cure said horses, and in our opinion is not subject to the criticism made thereon.

The court admitted certain testimony offered by the appellee as to the value of said horses immediately before and subsequent to the injury, which was objected to by the appellant on the ground that the witnesses who so testified did not have sufficient knowledge upon the subject to authorize them to express an opinion as to the value of said horses. The wit-

nesses who testified were engaged in buying, selling, and handling trotting and pacing horses, had seen the horses of appellee frequently before the injury, upon the track and in races, and knew their speed, quality, etc. We think this testimony competent, the weight thereof being a question for the jury. In any event, this evidence did the appellant no harm, as the remaining evidence was sufficient to support the verdict: Chicago etc. R. R. Co. v. Wedel, 144 Ill. 9, 32 N. E. 547; Doll v. People, 145 Ill. 253, 34 N. E. 413.

The appellant, upon the trial, called as a witness one Freshwater, who gave material evidence in its behalf. On cross-examination he was shown a statement in writing purporting to have been signed and sworn to by him and asked if he signed and swore to it. He neither admitted nor denied signing and swearing to said statement. The appellee, on rebuttal, called its manager and bookkeeper, who each testified that said statement was taken down in shorthand, written out upon the typewriter and signed and sworn to by Freshwater, and upon such proof the court admitted the statement in evidence for the purpose of impeachment. After Freshwater had heard the statement read he was recalled, and denied making the same or that he signed and swore to it. In support of a motion for a new trial the appellant filed the affidavit of the stenographer who said manager and bookkeeper testified had taken such statement in shorthand and transcribed the same upon the typewriter, who [16] denied she had taken or transcribed the same or that she was in the employ of appellee at the date the same was purported to have been made. The appellant insists that it was surprised upon the trial by the introduction of said statement, and urges upon the showing made the court erred in refusing to grant it a new trial. The newly discovered evidence was cumulative and by way of impeachment only, and was not conclusive. The law is well settled that a new trial will not be awarded on the ground of newly discovered evidence when the evidence is cumulative or by way of impeachment merely, and in its nature is not conclusive: Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Martin v. Ehrenfels, 24 Ill. 187; Friedberg v. People, 102 Ill. 160; Grady v. People, 125 Ill. 122, 16 N. E. 654; Monroe v. Snow, 131 Ill. 126, 23 N. E. 401.

We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed.

LIMITATION OF CARRIER'S LIABILITY IN BILLS OF LADING.*

I. In General.
 a. Liability of Common Carrier at Common Law in Absence of Special Contract.
 b. History of Right to Limit Liability by Contract.

II. What Necessary to Effect.
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 B. Acceptance of Dangerous or Unusual Articles for Carriage.
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 3. Presumption of.
 4. Lack of may be Shown.

*REFERENCES TO MONOGRAPHIC NOTES.

Power of common carrier to limit his liability: 82 Am. Dec. 495-507.
Liability of common carrier of livestock: 67 Am. Dec. 208-217.
Power of common carrier to limit the amount of his liability, in the event of loss, to a sum less than the injury sustained: 23 Am. St. Rep. 593-598.
Duties of express companies as common carriers: 61 Am. St. Rep. 860-885.
Limitation of carrier's liability: 5 Am. St. Rep. 719-729.
Stipulations which railroad company may not extort from shippers, and effect of such stipulations if extorted: 13 Am. St. Rep. 782-787.
Common carriers, who liable as: 47 Am. Dec. 648-654.

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C. Effect of Stipulations as to What Persons are to be Considered Servants of Carrier.
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E. Limiting Recovery to Value at Time and Place of Shipment.
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F. Where Damage is not Apparent.
G. When Substantial Compliance Sufficient.
H. Necessity for Notice Where Time Allowed Therefor is Unreasonably Short.
e. Stipulations Limiting Time Within Which Suit may be Brought for Loss or Damage.
f. Waiver by Carrier of Performance of Stipulations by Shipper.
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c. Applicable Only to Claims Arising on Bill of Lading.
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V. Burden of Proof.
a. Carrier must Bring Loss Within Exemptions of Bill of Lading.
b. As to Negligence of Carrier.
1. In General—Conflict of Authority.
2. Doctrine that Carrier must Show Lack of Negligence.
3. Doctrine that Shipper must Show Negligence.
4. Where Shipper Accompanies the Shipment.
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I. In General.

a. **Liability of Common Carrier at Common Law in Absence of Special Contract.**—The liability of a common carrier, as defined by the common law, is that of an insurer of the articles committed to his care, from loss or damage from any cause other than an act of God, the law, the public enemy, an act of the shipper, or an inherent vice in the article itself. "This is a politic establishment," says Lord Holt in the famous case of Coggs v. Bernard, 2 Ld. Raym. 909, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that very point."

b. **History of Right to Limit Liability by Contract.**—Based, therefore, upon considerations of public policy, the rule has been steadily adhered to both in England and America. The right of the carrier by contract with the shipper to soften the rigor of this common-law liability was, however, early recognized. It was declared by Lord Coke, in a note to Southcote's Case, 4 Coke, 83b, and was conceded in the case of Morse v. Slue, 1 Vent. 190-238. In England the right has never been doubted. In America, however, in an early case in New York (Gould v. Hill, 2 Hill, 623), it was held that a common carrier could not by any contract throw off the liability imposed upon him by the policy of the law. This doctrine, sanctioned also by an early case in Georgia (Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393), and by dicta in Jones v. Voorhees, 10 Ohio, 146, was soon repudiated by the supreme court of the United States in New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 344, and was early abandoned by the courts of New York: Parsons v. Monteath, 13 Barb. 353; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125.

"That which was public policy a hundred years ago," says Mr. Justice Strong in Southern Express Co. v. Caldwell, 88 U. S. 264, "has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus, his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy."

II. What Necessary to Effect.

a. Assent of Shipper.

1. Necessity of.

A. General Rule.—A carrier cannot, however, by any act of his own, or without the assent of the shipper, limit his common-law liability. He cannot, as a matter of right, demand that the shipper release him from any of the obligations laid upon him by the law. His employer may insist that he accept and carry goods under his responsibility at common law, and for a refusal to so carry, the carrier is liable: McMillan v. Michigan Southern etc. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Wehmann v. Minneapolis etc. R. Co., 58 Minn. 22, 59 N. W. 546; Southern Exp. Co. v. Moon, 39 Miss. 822; Illinois Cent. R. Co. v. Lancashire Ins. Co. (Miss.), 30 South. 43; Levering v. Union Transp. etc. Co., 42 Mo. 88, 97 Am. Dec. 320; Kirby v. Adams Express Co., 2 Mo. App. 369; Paddock v. Missouri Pac. Ry. Co., 60 Mo. App. 328; Selby v. Wilmington etc. R. Co., 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; Missouri etc. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Brown v. Adams Exp. Co., 15 W. Va. 812.

With one possible exception (see the next paragraph), the rule is well settled that a stipulation restricting the liability of a common carrier in any particular is of no binding force until it receives the assent, express or implied, of the shipper. Such a provision derives no strength merely from its insertion in a bill of lading. Until the assent of the consignor has given to it the effect of a contractual obligation, it can no more affect the rights of the parties

to the contract of carriage than can any other ex parte action by the carrier: Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Little Rock etc. Ry. Co. v. Cravens, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803: Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Adams Exp. Co. v. Haynes, 42 Ill. 89; Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Merchants' Dis. Transp. Co. v. Joesling, 89 Ill. 152; Perry v. Thompson, 98 Mass. 249; Michigan Central R. Co. v. Hale, 6 Mich. 243; Christenson v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Southern Exp. Co. v. Moon, 39 Miss. 822; Levering v. Union Transp. etc. Co., 42 Mo. 88, 97 Am. Dec. 320; Gaines v. Union Transp. etc. Co., 28 Ohio St. 418; Davis v. Central Vermont R. Co., 66 Vt. 200, 44 Am. St. Rep. 852, 29 Atl. 313; New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 344.

B To Reasonable Regulations of Carrier.—There is, however, one class of stipulations, frequently found in bills of lading, with reference to which, it has been held, there need be no assent on the part of the shipper. These are such reasonable regulations as the carrier may adopt with reference to "the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight and the like; as, for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such and paid for accordingly": Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Boscowitz v. Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191. The distinction is made between those stipulations which seek to discharge the carrier from duties which the law has annexed to his employment, and those which are said to be designed simply to insure good faith and fair dealing on the part of his employer: Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596. This distinction has not, however, been always followed even in Illinois, where it was thus laid down (see Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57), and as regards stipulations restricting the liability of the carrier to a certain sum unless a higher sum is named, its application is of very doubtful validity.

2. What is Evidence of.

A. In General.—It is in the application, rather than in the statement, of the rule that the difficulty arises. The necessity for assent on the part of the shipper is in general undoubted. What constitutes such assent is by no means so well settled. It may, of course, be express, but it is far more frequently implied. It is but seldom that the parties meet, discuss the terms, and then incorporate them into a bill of lading. The practical difficulty of bringing the carrier and shipper together in this manner has led to the adoption by

carriers of printed forms, which while they constitute a receipt for the goods delivered for carriage, at the same time contain stipulations purporting to bind the shipper to a contract limiting the liability of the carrier. These stipulations are, as we have seen, ineffective as limitations, until assented to by the consignor. In the absence, therefore, of express assent, it becomes necessary to determine what is necessary and what sufficient to give rise to an implied acceptance on the part of the shipper, to the terms proposed by the carrier in the printed bill of lading.

B. **Signing not Essential.**—Whatever may be deemed sufficient, it is well settled that, in the absence of a statute requiring it, the signature of the consignor is not necessary. If the shipper has by any other method indicated his acceptance of the terms contained in the bill of lading, he will be bound thereby as effectually as if he had signed the instrument: Adams Exp. Co. v. Haynes, 42 Ill. App. 89; Anchor Line v. Dater, 68 Ill. 369; Field v. Chicago etc. R. Co., 71 Ill. 458; Adams Exp. Co. v. Carnahan (Ind. App.), 63 N. E. 245; Gaines v. Union Transp. etc. Co., 28 Ohio St. 418; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589.

C. **Acceptance of Bill of Lading.**—In most cases, the only facts bearing upon the question of assent are that a bill of lading which contained stipulations purporting to limit the liability of the carrier was delivered to, and received by, the shipper at the time the goods were delivered by him for carriage. Whether assent to such terms is to be implied merely from the delivery and receipt of such an instrument is a question upon which the courts are not in complete harmony.

In Illinois and Ohio, it is held that assent to provisions limiting the liability of a carrier, cannot and should not be implied merely from the receipt without objection of a bill of lading containing stipulations of this nature: Adams Exp. Co. v. Haynes, 42 Ill. 89; Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Merchants' Des. Transp. Co. v. Theilbar, 86 Ill. 71; Merchants' Des. Transp. Co. v. Joesling, 89 Ill. 152; Erie etc. Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Chicago etc. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596; Chicago etc. Ry. Co. v. Calumet Stock Farm (principal case), 194 Ill. 9, ante, p. 68, 61 N. E. 1095; Wabash R. Co. v. Harris, 55 Ill. App. 159; Gaines v. Union Transp. etc. Co., 28 Ohio St. 418. Even under this doctrine, however, the statement made in some of the opinions, that express assent is required is not accurate. The rule goes no further than to require some other evidence of assent than the mere receipt of the bill of lading before any presumption of acceptance of the terms by the shipper can arise. If, however, it is shown that the latter has read without objection the terms of the bill of lading, even under the doctrine of the courts of Illinois and Ohio, his assent thereto will be presumed: Merchants' Disp. Transp. Co. v. Joesling, 89 Ill. 152. But

the onus of proving such assent is always on the carrier: Chicago etc. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596; Chicago etc. Ry. Co. v. Calumet Stock Farm (principal case), 194 Ill. 9, ante, p. 68, 61 N. E. 1095; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374.

With the exception of these two states, it is the generally accepted doctrine that the assent of a shipper to the terms contained in a bill of lading will be presumed from his acceptance of it without dissent, at the time of shipment. Mr. Justice Cooley, in McMillan v. Michigan Southern etc. R. Co., 16 Mich. 79, 93 Am. Dec. 208, uses the following language: "Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing."

This "natural presumption," as it has been called, is still further fortified in the case of bills of lading by the very general usage of inserting such terms therein. "It is the rule, rather than the exception," says Judge De Haven in Montagu v. The Henry B. Hyde, 82 Fed. 681, "for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms of conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading."

In the absence of fraud or imposition, therefore, and with the exception of the two jurisdictions before mentioned as holding the opposite view (Illinois and Ohio), the rule is well settled, both in this country and in England, that assent to stipulations in a bill of lading limiting the carrier's liability will be conclusively presumed from the acceptance of that instrument by the shipper without dissent: Mouton v. Louisville etc. R. Co., 128 Ala. 537, 29 South. 602; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Michalitschke v. Wells, Fargo & Co., 118 Cal. 683, 50 Pac. 847; Overland Mail etc. Co. v. Carroll, 7 Colo. 48, 1 Pac. 682; Galt v. Adams Exp. Co., 4 McAr. 124, 48 Am. Rep. 742; Adams Exp. Co. v. Carnahan (Ind. App.), 63 N. E. 245; Mulligan v. Illinois

Cent. R. Co., 36 Iowa, 181, 14 Am. Rep. 514; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665; Louisville etc. Ry. Co. v. Brownlee, 77 Ky. 590; Brehme v. Adams Exp. Co., 25 Md. 328; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Gott v. Dinsmore, 111 Mass. 45; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Cox v. Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Graves v. Adams Exp. Co., 176 Mass. 280, 57 N. E. 462; McMillan v. Michigan Southern etc. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Christenson v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; O'Bryan v. Kinney, 74 Mo. 25; St. Louis etc. R. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13; Hartmann v. Louisville etc. R. Co., 39 Mo. App. 88; Merrill v. American Exp. Co., 62 N. H. 514; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Germania Fire etc. Ins. Co. v. Memphis etc. Ry. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill v. Syracuse etc. R. Co., 73 N. Y. 351, 29 Am. Rep. 168; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 22 Atl. 1113; Merchants' etc. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Dillard v. Louisville etc. R. Co., 70 Tenn. 288; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589; Davis v. Central Vt. R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Boorman v. American Exp. Co., 21 Wis. 152; Morrison v. Phillips & Colby Const. Co., 44 Wis. 405, 28 Am. Rep. 599; Courteen v. Kanawha Despatch, 110 Wis. 610, 86 N. W. 176; Ullman v. Chicago etc. Ry. Co. (Wis.), 88 N. W. 41; Montague v. The Henry B. Hyde, 82 Fed. 681; Leitch v. Union R. R. Transp. Co., Fed. Cas. No. 8224; York etc. Ry. Co. v. Crisp, 25 Eng. L. & Eq. 396.

Michigan Cent. R. R. Co. v. Mineral Springs Mfg. Co., 83 U. S. 310, frequently cited as a decision of the supreme federal court in support of the contrary doctrine, while it contains language which, if standing alone, might justify such an interpretation, when considered in connection with the state of facts to which the language was addressed, decides no more than that assent to a stipulation not plainly a portion of the contract in the bill of lading will not be presumed from the mere acceptance of the latter by the shipper: Sayles v. New York etc. R. R. Co., 81 Fed. 326; New York etc. R. R. Co. v. Sayles, 87 Fed. 444.

D. **Failure to Read Bill of Lading Immaterial.**—Nor is this presumption of assent at all affected by the fact that the party accepting the bill of lading failed to read it and did not know its contents. If he has signed the instrument, or if, without signing, he has received it without any objection to the terms contained therein, he cannot afterward overcome the implication of assent arising from these facts, by proof that he neglected or failed to apprise himself of the contents of the bill of lading. "The law," says Justice Cooley in McMillan v. Michigan Southern etc. R. Co., 16 Mich.

79, 93 Am. Dec. 208, "does not assume to be the guardian of parties compotes mentes in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence." In Mulligan v. Illinois Cent. R. Co., 36 Iowa, 181, 14 Am. Rep. 514, the court used the following language: "It not appearing that any fraud or imposition was practiced, nor that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents, and if he did not do so, the consequences of his own folly and negligence must rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limits it would finally admit." And such is undoubtedly the law: Western Ry. Co. v. Herwell, 91 Ala. 340, 8 South. 649; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Black v. Wabash etc. Ry. Co., 111 Ill. 351, 53 Am. Rep. 628; Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424; Coles v. Louisville etc. R. Co., 41 Ill. App. 607; Stewart v. Cleveland etc. Ry. Co., 21 Ind. App. 218, 52 N. E. 89; Atchison etc. Ry. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; McMillan v. Michigan Southern etc. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Hutchinson v. Chicago etc. Ry. Co., 37 Minn. 524, 35 N. W. 433; Snider v. Adams Exp. Co., 63 Mo. 376; O'Bryan v. Kinney, 74 Mo. 25; St. Louis etc. R. R. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689; Brown v. Wabash etc. Ry. Co., 18 Mo. App. 568; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Hill v. Syracuse etc. Ry. Co., 73 N. Y. 351, 29 Am. Rep. 163; Phifer v. Carolina Cent. R. R. Co., 89 N. C. 311, 45 Am. Rep. 687; Johnstone v. Richmond etc. Ry. Co., 39 S. C. 55, 17 S. E. 512; Davis v. Central Vt. Ry. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Can v. Texas etc. Ry. Co., 113 Fed. 91; Leitch v. Union R. R. Transp. Co., Fed. Cas. No. 8224.

E. Inability to Read Immaterial.—In Fibel v. Livingston, 64 Barb. 179, and in Jones v. Cincinnati etc. Ry. Co., 89 Ala. 376, 8 South. 61, it appeared that the shipper could not read the bill of lading, in the former case because he was not conversant with the English language, and in the latter because of illiteracy. In neither case was this inability known to the carrier or his agent. In neither did the shipper sign the bill of lading, but in both the attempt to avoid the effect of stipulations limiting the carrier's liability, by reason of the inability of the shipper to read them, was unsuccessful. It was held that assent was nevertheless conclusively presumed from the acceptance of the bills, the court in the

New York case saying: "It can make no difference that the plaintiff was unable to read the contract. The defendant does not appear to have been aware of the plaintiff's inability to read, nor did the plaintiff inform him, or apply for any information concerning its contents. He left the defendant to act upon the presumption that he accepted the contract without objection."

F. Receipt of Bill of Lading After Shipment of Goods.—In order, however, that assent may be implied from the mere acceptance of a bill of lading without dissent, the instrument must be issued by the carrier and accepted by the shipper at or before the time of shipment of the goods. If the goods have been received by the carrier under an oral or written contract, a subsequent issuance by him of a bill of lading purporting to alter the terms of this contract in any particular, cannot affect the rights of the shipper under the previous contract, in the absence of some evidence of his assent to the terms of the bill of lading other than his mere receipt of it without objection. The rule that all prior oral negotiations are deemed to be merged in a subsequent written contract is in such case plainly inapplicable. The bill of lading does not form a "subsequent written contract" until its terms are accepted by the shipper, and such acceptance will not be presumed merely from failure to object to its terms.

Various reasons are given for this qualification of the general rule that assent to its terms will be presumed from the acquiescent receipt of a bill of lading. It is said that the carrier, having engaged to carry on certain terms, any subsequent attempt to limit his liability or change the terms of the contract must be supported by a new or additional consideration before it can become effective: Gage v. Tirrell, 91 Mass. 299; Southard v. Minneapolis etc. Ry. Co., 60 Minn. 382, 62 N. W. 442, 619. Another reason suggested is that the shipper, having parted with the control of the goods, is in no position to resist the attempted limitation of liability of the carrier, by reclaiming the goods and shipping them by another route, that his assent cannot, therefore, be said to have been fairly and freely given, and will not, for that reason, avail the carrier: Bostwick v. Baltimore etc. Ry. Co., 45 N. Y. 712; Germania Fire Ins. Co. v. Memphis etc. Ry. Co., 72 N. Y. 90, 28 Am. Rep. 113. Still a third ground, and that supported by the greatest number of authorities, is thus expressed by Dixon, C. J., in Strohn v. Detroit etc. Ry. Co., 21 Wis. 554, 94 Am. Dec. 564: "Nor do I think that the party is bound to examine the paper at once, and know its contents and return it to the company or give immediate notice of his dissent, at the peril of being held concluded on the ground of acquiescence or neglect. Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents,

after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it and procuring his assent."

Whatever the true basis of the rule, it is well established, and the authorities are uniform in requiring that actual assent be shown to a bill of lading, by which it is attempted to supersede a contract previously entered into. The previous contract may have been written, as in Gage v. Tirrell, 91 Mass. 299; it may have been an express oral agreement, as in Strohn v. Detroit etc. Ry. Co., 21 Wis. 554, 94 Am. Dec. 564; or it may have been in the shape of an implied contract of carriage under the common-law liability, arising from the very fact that no express contract was made, as in Illinois Cent. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164. In all such cases, proof of the subsequent delivery of a bill of lading, and its retention by the shipper without dissent, will not be sufficient, but it must be shown, in addition thereto, either that the latter knew of, and assented to, the special terms, or that, knowing that they were in the bill of lading, he was willing to accept them without examination: American Exp. Co. v. Spellman, 90 Ill. 455; Michigan Cent. Ry. Co. v. Boyd, 91 Ill. 268; Merchants' etc. Transp. Co. v. Furthmann, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; Cleveland etc. Ry. Co. v. Wilson, 99 Ill. App. 367; Missouri Pac. Ry. Co. v. Beeson, 30 Kan. 298, 2 Pac. 496; Gage v. Tirrell, 91 Mass. 299; Gott v. Dinsmore, 111 Mass. 45; Southard v. Minneapolis etc. Ry. Co., 60 Minn. 382, 62 N. W. 442, 919; O'Bryan v. Kinney, 74 Mo. 25; McCullough v. Wabash etc. Ry. Co., 34 Mo. App. 23; Doan v. St. Louis etc. Co., 38 Mo. App. 408; Bostwick v. Baltimore etc. Ry. Co., 45 N. Y. 712; Germania Fire Ins. Co. v. Memphis etc. Ry. Co., 72 N. Y. 90, 28 Am. Rep. 113; Lamb v. Camden etc. Ry. Co., 4 Daly, 483; Gaines v. Union etc. Ins. Co., 28 Ohio St. 418; Illinois Cent. Ry. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164; Atchison etc. Ry. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Missouri etc. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Strohn v. Detroit etc. Ry. Co., 21 Wis. 554, 94 Am. Dec. 564; The Arctic Bird, 109 Fed. 167.

G. **Receipt of Bill of Lading After Shipment of Goods, but in Accordance with Prior Agreement.**—This qualification of the rule that assent will be presumed from acceptance of a bill of lading without dissent is, however, itself subject to a qualification. If the bill of lading, although issued and received after the shipment of the goods, is so issued in accordance with and in execution of a prior agreement, assent to the terms of the instrument may be implied from its receipt without objection: Merchants' etc. Transp. Co. v. Furthmann, 47 Ill. App. 561; Shelton v. Merchants' etc. Transp. Co., 59 N. Y. 258; Leitch v. Union etc. Transp. Co., Fed. Cas. No. 8224. But if the bill of lading, as issued, contains terms variant from those previously agreed upon, no presumption of as-

sent can arise from its receipt, even if it was the expectation of both parties, when the goods were delivered, that the bills of lading would be given: Swift v. Pacific Mail S. S. Co., 106 N. Y. 206, 12 N. E. 583.

H. Previous Dealings of Carrier and Shipper.—In determining whether or not the shipper has assented to the limitations of liability inserted in the bill of lading by the carrier, the previous dealings between the parties, the use of similar forms in the past, etc., are properly held important as evidence of such assent or its absence. "In attempting to prove the shipper's knowledge of or assent to the terms of the bill of lading, the carrier is not limited to evidence of any one particular fact, but may prove all the circumstances surrounding the transaction which have any legitimate tendency to establish the shipper's knowledge or assent. Such facts may be shown, it is true, by direct evidence of express notice and assent at the time, but that is by no means the only evidence by which they may be established. They may be shown, presumptively, by evidence of a long course of previous dealings between the parties of a like character, or by previous proposals by the shipper to the carrier as to the terms and conditions upon which the shipment should be made": Lake Shore etc. Ry. Co. v. Davis, 16 Ill. App. 425. See, also, in this connection, Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Erie etc. Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Perry v. Thompson, 98 Mass. 249; Hartmann v. Louisville etc. Ry. Co. 39 Mo. App. 88; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 22 Atl. 1113.

J. To Stipulations on the Back of Bill of Lading.—In order that any presumption of assent to a stipulation in a bill of lading limiting the liability of a carrier may arise, it must appear that the clause containing this exemption from liability plainly formed a part of the contract contained in the bill of lading. Thus, where that portion of a bill of lading which contained the clause qualifying the carrier's liability was so covered with a revenue stamp as to render it unintelligible, it was held that no assent to such a stipulation could be presumed, in the absence of proof that the shipper had actual knowledge of its contents: Perry v. Thompson, 98 Mass. 249. And while a stipulation of this nature printed on the back of a bill of lading will be quite as effective as if printed on its face, if it is shown that the consignor knew of its terms (Adams Exp. Co. v. Haynes, 42 Ill. 89), the authorities are uniform to the effect that a stipulation on the back of the instrument will not be deemed to have been assented to, in the absence of proof of such knowledge. It is treated as a mere notice or memorandum, and unless contained in the body of the instrument will not be regarded as forming any part of the contract to which the shipper has presumptively assented by his reception of the bill of lading without objection to its terms: See Western Transp. Co. v.

Newhall, 24 Ill. 466, 76 Am. Dec. 760; Merchants' etc. Transp. Co. v. Furthmann, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; Limburger v. Westcott, 49 Barb. 283; Newell v. Smith, 49 Vt. 255; Michigan Cent. Ry. Co. v. Mineral Springs Mfg. Co., 83 U. S. 319; Brittan v. Barnaby, 62 U. S. 527; Ormsby v. Union Pac. Ry. Co., 4 Fed. 706; Montague v. The Henry B. Hyde, 82 Fed. 681; New York etc. Ry. Co. v. Sayles, 87 Fed. 444; affirming 81 Fed. 326; Ayres v. Western Ry. Corp., 14 Blatchf. 9, Fed. Cas. No. 689. See, also, in this connection, as to the effect of stipulations printed in small type, Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589.

3. Who Agent of Shipper to Give Assent.

A. Agent to Ship.—If an agent employed by a shipper to deliver goods for transportation accepts a bill of lading limiting the liability of the carrier, his principal will be bound thereby. An authority to ship goods carries with it all the usual and necessary means of carrying it into effect, and obviously includes authority to stipulate with the carrier as to the terms of transportation: California Powder Works v. Atlantic etc. Ry. Co., 113 Cal. 329, 45 Pac. 691; Illinois Cent. Ry. Co. v. Jonte, 13 Ill. App. 424; Western Transit Co. v. Hosking, 19 Ill. App. 607; Nelson v. Hudson River Ry. Co., 48 N. Y. 498; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394; Shelton v. Merchants' etc. Transp. Co., 59 N. Y. 258; Gulf etc. Ry. Co. v. White (Tex. Civ. App.), 32 S. W. 322; The St. Hubert, 102 Fed. 362; affirmed, 107 Fed. 727; Aldridge v. Great Western Ry. Co., 15 Com. B., N. S., 582.

B. Consignor.—A consignor empowered to ship goods has therefore implied authority to negotiate for terms of transportation with the carrier, and a bill of lading accepted by him will operate to bind the consignee. His authority is in such case presumed and the carrier is under no obligation to inquire into his right to enter into the contract of carriage: Brown v. Louisville etc. Ry. Co., 36 Ill. App. 140; McMillan v. Michigan etc. Ry. Co., 16 Mich. 79, 93 Am. Dec. 208; Donovan v. Standard Oil Co., 155 N. Y. 112, 49 N. E. 678; Moriarty v. Harnden's Exp., 1 Daly, 227; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589.

C. Drover in Charge of Shipment.—In making shipments of livestock it is usual for an agent of the owner to accompany and care for the stock. Such agent, it has been held, has authority to stipulate with connecting carriers for transportation to the destination of the shipment, and a bill of lading accepted, or a contract entered into by him, limiting the liability of the connecting carrier, will be binding on the owner of the stock: Squire v. New York Cent. R. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Armstrong v. Chicago etc. Ry. Co., 53 Minn. 183, 54 N. W. 1059. In Gulf etc. Ry. Co. v. White (Tex. Civ. App.), 32 S. W. 322, however, it was held that no authority in such agents to make contracts with connecting

carriers would be presumed in the absence of evidence that they had authority to deliver the stock to such connecting carrier or had in fact done so.

D. **Initial Carrier on Contract to Carry Beyond His Terminus.** Where goods are sent to a destination beyond the line of the initial carrier, it is held that such initial carrier is the agent of the shipper in so far as to enable him to contract with the connecting carriers for transportation of the goods over their line. As is said in The St. Hubert, 102 Fed. 362: "The first carrier cannot impose the terms of the original contract upon the connecting line. The power of the first carrier to accept from the second carrier a bill of lading containing the terms upon which alone the latter will continue the transportation is of necessity a part of the first carrier's obligation to forward at the end of his own line. The first carrier is under a duty to forward, even if he does not expressly so agree, and he cannot discharge this duty unless he is able freely to contract with the carrier whose line is next to undertake the movement of the goods": Affirmed, The St. Hubert, 107 Fed. 727. See, also, Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394.

b. Consideration.

1. **Necessity of.**—Mere notice is, as we have already seen, ineffectual to limit the liability of a common carrier. Clauses of this nature, in order to release the carrier from the liability imposed upon him by the common law, must be embodied in a contract assented to by the shipper. More, however, than the assent of the shipper is essential to the formation of a valid contract. There must be some consideration for the agreement of the shipper to accept a qualified responsibility from the carrier.

2. What Constitutes.

A. **Acceptance of Articles for Carriage.**—Acceptance of the article for carriage by the carrier is not of itself consideration for any limitation of liability. The performance of a legal obligation furnishes no consideration for any agreement. The carrier is bound to accept the article offered, if it be not of an unusual or dangerous character, and is bound to carry it under the responsibility laid upon him as a public carrier by the law. He cannot refuse to carry it, nor can he refuse to carry it under his common-law liability. The case of Hutchinson v. Chicago etc. Ry. Co., 37 Minn. 524, 35 N. W. 433, holds, however, that the delivery and acceptance of the article for carriage is a sufficient mutual consideration to sustain a limitation of the carrier's liability. Similar language is used by Hunt, C., in Nelson v. Hudson River R. R. Co., 48 N. Y. 498, but that case is put on the proper ground by the opinion of Earl, C., from which it appears that the limitation of the railroad company's liability was in fact supported by a concession in the rates of carriage. The Minnesota case has not been

followed in that state (see Wehmann v. Minneapolis etc. Ry. Co., 58 Minn. 22, 59 N. W. 546), and the rule is well settled both on principle and authority that any contract qualifying the common-law responsibility of a common carrier must be supported by a valid consideration, apart from the mere acceptance of the article for carriage: Baltimore etc. Ry. Co. v. Crawford, 65 Ill. App. 113; Stewart v. Cleveland etc. Ry. Co., 21 Ind. App. 218, 52 N. E. 89; German v. Chicago etc. Ry. Co., 38 Iowa, 127; Wehman v. Minneapolis etc. Ry. Co., 58 Minn. 22, 59 N. W. 546; Southard v. Minneapolis etc. Ry. Co., 60 Minn. 382, 62 N. W. 442, 619; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689; Conover v. Pacific Exp. Co., 40 Mo. App. 31; Hance v. Wabash etc. Ry. Co., 56 Mo. App. 476; Paddock v. Missouri Pac. Ry. Co., 60 Mo. App. 328; Potter v. Sharp, 24 Hun, 179; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328; Scholter v. Chicago etc. Ry. Co., 97 Wis. 31, 71 N. W. 1042; Louisville etc. Ry. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018; Ft. Worth etc. Ry. Co. v. Wright (Tex. Civ. App.), 38 S. W. 846.

B. **Acceptance of Dangerous or Unusual Articles for Carriage.** A common carrier is not, however, bound to accept for carriage articles which are in themselves dangerous. As to these it is entirely optional with him whether he will agree to transport them or not. If, therefore, he chooses to accept such articles as gunpowder, nitroglycerin, etc., he may do so upon such terms and with such limitations of his common-law liability as he sees fit. In receiving them at all he is doing more than the law requires of him as a common carrier, and in such cases the acceptance of the article itself may well be a sufficient consideration for any qualification of his responsibility: California Powder Works v. Atlantic etc. Ry. Co., 113 Cal. 329, 45 Pac. 691.

So where a railroad company, contracting as a private carrier, agrees to furnish the motive power for a train composed of the owner's cars, as is usual in the transportation of a circus train, it may impose whatever terms it sees fit. In such case the agreement to carry is itself consideration for the contract. Such contracts do not usually, it is true, take the form of a technical bill of lading, but the principles governing them are in no way altered by this fact: See in this connection, Robertson v. Old Colony R. R. Co., 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; Coup v. Wabash etc. R. Co., 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; Forepaugh v. Delaware etc. Ry. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503; Chicago etc. Ry. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 24 U. S. App. 589.

C. **Reduction of Rates Sufficient.**—Ordinarily, however, the consideration relied upon by the carrier to support a qualification of his common-law liability is a reduction in the rates of transportation. Such abatement of charges, it is well settled, is a good con-

sideration for a limitation of liability on the part of the carrier: Mouton v. Louisville etc. R. Co., 128 Ala. 537, 29 South. 602; Illinois Cent. R. R. Co. v. Morrison, 19 Ill. 136; Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251; Duvenick v. Missouri Pac. Ry. Co., 57 Mo. App. 550; Zimmer v. New York Cent. R. R. Co., 137 N. Y. 460, 33 N. E. 642; Johnstone v. Richmond etc. R. Co., 39 S. C. 55, 17 S. E. 512; Louisville etc. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018.

3. Presumption of.—It need not, however, be affirmatively shown that the contract was supported by such consideration. In the absence of evidence to the contrary, it is presumed that the rates for the carriage of goods are made with reference to the risk assumed, and any lack of consideration must be established by the party seeking to avoid the limitation of liability: St. Louis etc. Ry. Co. v. Lesser, 46 Ark. 236; St. Louis etc. R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; Brown v. Louisville etc. R. Co., 36 Ill. App. 140; McMillan v. Michigan Southern etc. Ry. Co., 16 Mich. 79, 93 Am. Dec. 208; Wehmann v. Minneapolis etc. R. Co., 58 Minn. 22, 59 N. W. 546; Kellerman v. Kansas City etc. Co., 68 Mo. App. 255; Maghee v. Camden etc. Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Nelson v. Hudson River R. Co., 48 N. Y. 498; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Schaller v. Chicago etc. Ry. Co., 97 Wis. 31, 71 N. W. 1042; Courtun v. Kanawha Dispatch, 110 Wis. 610, 86 N. W. 176; York Co. v. Central R. R. Co., 70 U. S. 107.

On the other hand, where the rate charged for carriage of the goods under a contract limiting the carrier's liability is the maximum allowed by law, there can obviously be no presumption that the charges have been reduced in consideration of the limitation of liability: Kellerman v. Kansas City etc. R. Co., 68 Mo. App. 255; Paddock v. Missouri Pac. Ry. Co., 60 Mo. App. 328. Nor can such a presumption exist where any abatement of rates is forbidden by act of Congress: Wehmann v. Minneapolis etc. Ry. Co., 58 Minn. 22, 59 N. W. 546; Ward v. Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28.

4. Lack of may be Shown.—Moreover, the presumption is in any case merely prima facie, and it may always be shown even in the face of a statement to the contrary in the bill of lading, that the stipulation limiting the liability of the carrier is in fact without consideration. Such statements in the bill of lading are of course prima facie evidence of the fact they are intended to establish: St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Doan v. St. Louis etc. Ry. Co., 38 Mo. App. 408; but they in no way conclude the shipper from showing the facts as they exist. As is said in McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689: "The written contract is not, under these circumstances, conclusive evidence, but merely prima facie evidence that the given rate was a special and reduced rate. As between the parties, it was in this respect open to explanation and impeachable for error, mistake or false statement.

.... The consideration clause in bills of lading, contracts, deeds and other instruments ordinarily has only the force and effect of a written receipt, and is open to explanation and contradiction by parol." See to the same effect, Georgia R. R. etc. Co. v. Reid, 91 Ga. 377, 17 S. E. 934; Baltimore etc. Ry. Co. v. Crawford, 65 Ill. App. 113; Kansas Pac. Ry. Co. v. Reynolds, 17 Kan. 251; Missouri etc. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

c. Reasonableness.

1. **Must be Reasonable—Inequality of Parties.**—Ordinarily, the courts are not concerned with the reasonableness or fairness of contracts into which parties see fit to enter. If two parties, both of them competent to contract, enter into an agreement lawful in its purpose, and supported by a valid consideration, they will be bound thereby, however much one may profit under the contract. Contracts limiting the liability of common carriers do not, however, find favor in the courts, and this fact, coupled with the obviously unequal positions which the shipper and the carrier occupy in the matter of imposing terms upon each other, has led the courts to demand that in the formation of contracts of this nature there must be no imposition on the part of the carrier, and that the agreement be fairly and freely entered into by the shipper.

In this connection, the frequently quoted language of Mr. Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. 357, is pertinent: "It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents—often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. If the customer had any real freedom of choice, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the pub-

lic. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least), to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness." And see to the same effect, South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Little Rock etc. Ry. Co. v. Cravens, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803; Michigan Cent. Ry. Co. v. Hale, 6 Mich. 243; Mitchell v. Carolina Cent. Ry. Co., 124 N. C. 236, 32 S. E. 671; Willock v. Pennsylvania R. R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674, 30 Atl. 948; Missouri etc. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Michigan Cent. R. R. Co. v. Mineral Springs Mfg. Co., 83 U. S. 319; Southern Exp. Co. v. Caldwell, 88 U. S. 264. In England this rule has been incorporated into the railway and canal traffic act of 1854, requiring that all contracts limiting the liability of a carrier belonging to the class indicated by the title of the act, shall be binding only when the same shall "be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable."

2. **Burden of Proof on Carrier to Show Reasonableness.**—The considerations which lead to the requirement that stipulations of this kind be reasonable have been held to demand that the carrier assume the burden of proving them so, and it is accordingly well settled that the onus of proving that a stipulation incorporated into a bill of lading, purporting to qualify the responsibility of the common carrier is reasonable, rests upon the latter: Kansas etc. Ry. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515; Cox v. Central Vermont Ry. Co., 170 Mass. 129, 49 N. E. 97; Hinkle v. Southern Ry. Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Louisville etc. Ry. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018. In Texas the carrier is required to allege in his pleadings and prove by evidence facts sufficient to show that the stipulation relied upon as limiting his liability is reasonable: Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Fort Worth etc. Ry. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Texas etc. Ry. Co. v. Reeves, 90 Tex. 499, 39 S. W. 564; St. Louis etc. Ry. Co. v. Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008; Missouri Pac. Ry. Co. v. Paine, 1 Tex. Civ. App. 621, 21

S. W. 78; Houston etc. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308.

In South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578, and in Thompson v. Chicago etc. Ry. Co., 22 Mo. App. 321, it was held that the question whether a stipulation was reasonable or not is to be determined by the court. The contrary was, however, held in Gulf etc. Ry. Co. v. Hume, 87 Tex. 211, 27 S. W. 110; and in Texas etc. Ry. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56, 14 S. W. 666, where the question of the reasonableness of such a clause was deemed proper for submission to the jury.

3. Shipper must have Option of Securing Carriage Under Common-law Liability.

A. General Rule.—In accordance with the principle that no limitation of liability on the part of a common carrier is valid unless it was fairly and freely entered into, it is held that such stipulations, although supported by a valid consideration, are binding only when the shipper was given the option of contracting for the carrier's service without any restriction of the carrier's liability. He must have had the alternative of shipping his goods under the common-law liability of the carrier and at a reasonable rate, or of accepting a contract of limited liability in consideraton of a lower rate. The prospective shipper must have had real freedom of choice, or the contract into which he enters will not be regarded as having been fairly made: Little Rock etc. Ry. Co. v. Cravens, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803; Railway Co. v. Spann, 57 Ark. 127, 20 S. W. 914; Pacific Exp. Co. v. Wallace, 60 Ark. 100, 29 S. W. 32; Atchison etc. Ry. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Adams Exp. Co. v. Nock, 2 Duvall, 562, 87 Am. Dec. 510; Illinois Cent. Ry. Co. v. Lancashire Ins. Co. (Miss), 30 South. 48; Knell v. United States etc. S. S. Co., 33 N. Y. Sup. Ct. 423; Kimball v. Rutland etc. R. R. Co., 26 Vt. 247, 62 Am. Dec. 567.

B. What Sufficient Option.—If, therefore, the carrier refuses to accept the goods for carriage, unless the shipper consents to enter into a contract releasing him from the full measure of his responsibility at common law, the contract so procured is void. In such case it is not sufficient to say that the shipper might refuse to ship and sue the carrier. As is said in Little Rock etc. Ry. Co. v. Cravens, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803: "The individual feels that transportation is necessary to his success, and that unless he gets it promptly, he will suffer inconvenience and perhaps loss; he regards the probability of loss in transit as remote, and knows that if there is no loss the contract is immaterial. Under such circumstances he will assume the risk of contingent future loss, rather than sustain a loss that is certain and present." A bill of lading limiting the liability of the

carrier and accepted under conditions such as these, is "an imposition of terms rather than a contract," and is certainly not a contract fairly and freely made.

The mere fact that the contract limiting the carrier's liability was the one ordinarily used is immaterial, provided the carrier stands willing to carry under his common-law responsibility: Duvenick v. Missouri Pac. Ry. Co., 57 Mo. App. 550. Nor is a contract for a limited liability rendered invalid by the fact that, although the carrier had higher rates for carriage under an unlimited responsibility, these higher rates were not always charged: Stewart v. Cleveland etc. Ry. Co., 21 Ind. App. 218, 52 N. E. 89. But the option must be both reasonable and bona fide. It must appear that the alternative is not itself unreasonable, and if merely colorable it will be of no effect: Louisville etc. Ry. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018; Illinois Cent. R. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164; Lloyd v. Waterford etc. Ry. Co., 15 I. R. C. L. 37.

The carrier need not offer the shipper the alternative of carriage under a restricted and under an unrestricted liability: Louisville etc. Ry. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Deming v. Merchants' Cotton Press etc. Co., 90 Tenn. 306, 17 S. W. 89. It is sufficient that the agent was empowered to accept the goods for transportation under either contract. And this is not only sufficient, but necessary. If, in fact, the agent could, under the instructions of the carrier, accept goods for carriage only under a contract restricting the carrier's liability, it is of no consequence that the shipper did propose or demand a different contract. Such was the state of facts in Little Rock etc. Ry. Co. v. Cravens, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803, and the court disposed of the objection that the shipper had proposed no other contract as follows: "The case stands just as if the plaintiff had demanded a different contract and agreed to the one accepted because he could get no other. Carriers do their business in pursuance of a general plan, and of this the public are advised, and when the defendants adopted a plan and instructed their agent to pursue it, and authorized him to pursue no other, their customers were not called upon to ask a change of the plan or a departure from its terms, in their particular matters; they had a right to suppose that the agent would not deviate from his instructions." To the same effect, see Louisville etc. Ry. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018.

III. Validity and Effect of.

a. Does not Affect Character as a Common Carrier.—Notwithstanding a few unguarded expressions to be found in the cases (East Tennessee etc. Ry. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Michigan Cent. Ry. Co. v. Ward, 2 Mich. 538; Penn v. Buffalo etc. Ry. Co., 49 N. Y. 204, 10 Am. Rep. 355; Kimball v. Rutland etc. Ry. Co., 26 Vt. 247, 62 Am. Dec. 567), the law may be regarded as well settled that a common carrier is not divested of his public

employment in any particular case by the fact that the contract of transportation in that case limited his responsibilities in some respect. "The employer of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibility under which he rests. Even if the extent of these responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not devest it of that character": Liverpool etc. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469, per Gray, J. See to the same effect, Terre Haute etc. R. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Hull v. Chicago etc. Ry. Co., 41 Minn. 510, 16 Am. St. Rep. 722, 43 N. W. 391; Hinkle v. Southern Ry. Co., 126 N. C. 982, 78 Am. St. Rep. 685, 36 S. E. 348; Gaines v. Union Transp. & Ins. Co., 28 Ohio St. 418; Wallingford v. Columbia etc. R. Co., 26 S. C. 258, 2 S. E. 19; Crawford v. Southern Ry. Co., 56 S. C. 136, 34 S. E. 80; Brown v. Adams Exp. Co., 15 W. Va. 812; York Co. v. Central R. R. Co., 70 U. S. 107; Railroad Co. v. Lockwood, 17 Wall. 357; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Hall v. Pennsylvania R. R. Co., 1 Fed. 226.

b. For Losses Caused by Negligence of Carrier or His Servants.

1. Validity of.

A. General Rule.—As a necessary corollary to this rule that a common carrier cannot, and does not, relieve himself of his character as a public carrier merely by entering into a contract with his employers by which his responsibility is in some degree diminished, it follows that he cannot by any contract throw off the essential duties of his employment. "The fundamental principle," says the court in Liverpool etc. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469, "upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the

essential duties of his employment." Any contract, therefore, by which the carrier stipulates against liability for loss or damage to goods committed to his care, arising from his own negligence or that of his servants, is opposed to public policy, and to that extent void. The reasoning by which this conclusion has been reached is that, by reason of the inequality of the parties, the public policy to be subserved, and the public nature of his employment, a common carrier can limit his liability only by stipulations which are in themselves just and reasonable; and that a contract by which such a carrier seeks to wholly exempt himself from liability for his own or his servant's negligence is unreasonable and void. This qualification of the carrier's right to restrict his common-law responsibility by special contract is almost as generally recognized as is the right itself, and is supported by innumerable authorities: Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; East Tennessee etc. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Alabama etc. Ry. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119, 7 South. 762; Louisville etc. R. Co. v. Cowherd, 120 Ala. 51, 23 South. 793; Little Rock etc. R. Co. v. Talbot, 39 Ark. 523, 47 Ark. 97, 14 S. W. 471; Pacific Exp. Co. v. Wallace, 60 Ark. 100, 29 S. W. 32; Merchants' Disp. etc. Co. v. Cornfortli, 3 Colo. 280, 25 Am. Rep. 757; Welch v. Boston etc. R. R. Co., 41 Conn. 333; Western etc. Ry. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916; Central Ry. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750; Boscowitz v. Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Illinois Cent. Ry. Co. v. Jonte, 13 Ill. App. 424; Louisville etc. R. Co. v. Cunningham, 88 Ill. App. 289; Adams Exp. Co. v. Fendrick, 38 Ind. 150; Insurance Company of North America v. Lake Erie etc. Ry. Co., 152 Ind. 333, 53 N. E. 382; Reid v. Evansville etc. R. R. Co., 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; Cleveland etc. Ry. Co. v. Heath, 22 Ind. App. 47, 52 N. E. 198; Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; Kallman v. United States Exp. Co., 3 Kan. 205; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665; Louisville etc. R. Co. v. Brownlee, 77 Ky. 590; Maxwell v. Southern Pac. Co., 48 La. Ann. 385, 19 South. 287; Sager v. Portsmouth etc. R. Co., 31 Me. 228, 50 Am. Dec. 659; Cox v. Central Vermont Ry. Co., 170 Mass. 129, 49 N. E. 97; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Christenson v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Moulton v. St. Paul etc. Ry. Co., 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497; Southard v. Minneapolis etc. Ry. Co., 60 Minn. 382, 62 N. W. 442, 619; Johnson v. Alabama etc. Ry. Co., 69 Miss. 191, 30 Am. St. Rep. 534, 11 South. 104; New Orleans etc. R. Co. v. Faler, 58 Miss. 911; Illinois Cent. Ry. Co. v. Bogard, 78 Miss. 11, 27 South. 879; Levering v. Union Transp. etc. Co., 42 Mo. 88, 97 Am. Dec. 320; Clark v. St. Louis etc. Ry. Co., 64 Mo. 440; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689; Chicago etc. Ry.

Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183; Pennsylvania Co. v. Keeward etc. Co., 59 Neb. 435, 81 N. W. 372; Merril v. American Exp. Co., 62 N. H. 514; Capehart v. Seaboard etc. R. R. Co., 81 N. C. 438, 31 Am. Rep. 505; Phifer v. Carolina Cent. Ry. Co., 89 N. C. 311, 45 Am. Rep. 687; Welsh v. Pittsburgh etc. R. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Pittsburgh etc. Ry. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; Golden v. Pennsylvania R. R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Powell v. Pennsylvania R. R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670, 13 Atl. 324; Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674, 30 Atl. 948; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 22 Atl. 1113; Wallingford v. Columbia etc. Ry. Co., 26 S. C. 258, 2 S. E. 19; Crawford v. Southern Ry. Co., 56 S. C. 136, 34 S. E. 80; Merchants' Disp. Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Louisville etc. Ry. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Missouri etc. Ry. Co. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758, 9 S. W. 346; Davis v. Central Vt. Ry. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Norfolk etc. Ry. Co. v. Harman, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490; Mashin v. Baltimore etc. R. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Berry v. West Virginia etc. Ry. Co., 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143; Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; Davis v. Chicago etc. Ry. Co., 93 Wis. 470, 57 Am. St. Rep. 935, 67 N. W. 16, 1132; New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 344; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Compagnie de Navigacion etc. v. Brauer, 168 U. S. 104, 18 Sup. Ct. Rep. 12; Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. Rep. 30.

B. Exemption from Liability Except for "Gross" Negligence.—In a number of cases, the principal case among them, the courts have used expressions which seem to intimate that a carrier could exempt himself from liability for loss arising through his own or his servant's ordinary negligence, but not for losses arising from "gross" or "willful" negligence. These expressions are particularly frequent in the Illinois opinions. Thus it is said in Illinois Cent. R. Co. v. Morrison, 19 Ill. 136, that "railroads have the right to restrict their liabilities as common carriers by such contract as may be agreed upon specially, they still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate." In Arnold v. Illinois Cent. R. R. Co., 83 Ill. 273, 25 Am. Rep. 383, the court declared that "the doctrine is settled in this court that railroad companies may by contract exempt themselves from liabilities on account of the negligence of their servants, other than that which is gross or willful." Similar language is to be found in the following cases: Cooper v. Raleigh etc. Ry. Co., 110 Ga. 659, 36 S. E. 240; Chicago etc. Ry. Co. v. Montfort, 60 Ill. 175; Wabash

Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Lake Shore etc. Ry. Co. v. Davis, 16 Ill. App. 425; Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417; Chicago etc. Ry. Co. v. Harmon, 17 Ill. App. 640; Chicago etc. R. Co. v. Miller, 79 Ill. App. 473; Chicago etc. R. Co. v. Calumet Stock Farm (principal case), 194 Ill. 9, ante, p. 68, 61 N. E. 1095; Reno v. Hogan, 51 Ky. 63, 54 Am. Dec. 513; Rhodes v. Louisville etc. Ry. Co., 72 Ky. 688; Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. 87; Chicago etc. Ry. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508 (the two cases preceding are with reference to law of Illinois); Black v. Goodrich Transp. Co., 55 Wis. 319, 42 Am. Rep. 713, 13 N. W. 244; Merriman v. The May Queen, Newb. Adm. 464, Fed. Cas. No. 9481; Smith v. Home, 8 Taunt. 144; Birkett v. Willan, 2 Barn. & Ald. 356. And see New Orleans etc. R. Co. v. Faler, 58 Miss. 911.

Even in Illinois, however, it is more than doubtful whether any distinction exists between the right of the carrier to contract against liability for loss arising from his ordinary negligence and that arising from gross negligence. The existence of such a rule has been doubted as late as 1897 in Chicago etc. Ry. Co. v. Grimes, 71 Ill. App. 397, and the rule is probably the same in Illinois as elsewhere—that there can be no exemption from liability from the results of negligence, whether slight, ordinary or gross. That no very definite meaning is attached to "gross" negligence in its use in this connection by the Illinois courts is shown by the following quotation from Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417: "We are committed to the doctrine that a common carrier cannot, even by express contract, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants or employés. Whatever may be the rule elsewhere, in this state the common carrier cannot contract for exemption from responsibility for a failure on its part, or that of its servants, to exercise ordinary care in the transaction of its business." "Ordinary" and "gross" are quite evidently here treated as synonymous, and the court of Illinois has frequently denounced as contrary to public policy, and therefore void, stipulations which sought to relieve the carrier from the consequences of his "actual" negligence: Cleveland etc. Ry. Co. v. Newlin, 74 Ill. App. 638; or from his failure to exercise "ordinary" care: United States Exp. Co. v. Council, 84 Ill. App. 491; United States Exp. Co. v. Burke, 94 Ill. App. 29; Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57.

Encouraged by such expressions as those under consideration, carriers have, in numerous instances, inserted into their bills of lading provisions that they shall be liable only for loss occasioned by "gross," or "willful," or "wanton" negligence, and have thus sought to escape responsibility for the exercise of ordinary care. In general, however, the attempt has been unsuccessful, and the rule of the best considered cases is well expressed by Christian, J., in Vir-

ginia etc. R. R. Co. v. Sayers, 26 Gratt. 328, in which, after an excellent review of the authorities, it is said: "The tendency of judicial opinion is adverse to any distinction between gross and ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate to call it simply 'negligence.' The decided preponderance of authority is in favor of abolishing the vague and uncertain distinctions between the different degrees of negligence, and to hold the public carrier bound whenever it is shown that the loss or damage is occasioned by negligence at all, whether gross or ordinary; or, in other words, the carrier is bound to ordinary diligence." And see to the same effect, East Tennessee etc. Ry. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Alabama etc. Ry. Co. v. Thomas, 83 Ala. 343, 3 South. 802; Central etc. Co. v. Smitha, 85 Ala. 47, 4 South. 708; Louisville etc. Ry. Co. v. Grant, 99 Ala. 325, 13 South. 599; Michigan Southern etc. Ry. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Sager v. Portsmouth etc. R. R. Co., 31 Me. 228, 50 Am. Dec. 659; Newberger Cotton Co. v. Illinois Cent. Ry. Co., 75 Miss. 303, 23 South. 186; Atchison etc. Ry. Co. v. Washburn, 5 Neb. 117; Welsh v. Pittsburgh etc. R. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Maslin v. Baltimore etc. R. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Railroad Co. v. Lockwood, 17 Wall. 357; Wyld v. Pickford, 8 Mees. & W. 442, 461.

C. **Doctrine in New York.**—From the position taken in Gould v. Hill, 2 Hill, 623, denying the right of a common carrier to limit his common-law liability by contract or otherwise, the courts of New York have now swung to the other extreme, and permit a common carrier to totally exempt himself from any liability for his own negligence or that of his servants. The doctrine of Gould v. Hill, 2 Hill, 623, opposed as it was to both principle and authority, was soon overruled in New York (Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Parsons v. Monteath, 13 Barb. 353), but the limitation elsewhere recognized was adopted, and in Parsons v. Monteath, 13 Barb. 353, it was expressly said that the carrier could not exempt himself from responsibility for negligence or fraud. This position was, of course, in accord with the great weight of authority. It was, however, soon abandoned, and the law is now well settled in New York that a common carrier may by appropriate language exempt himself from responsibility for loss or damage to goods, whether lost through his negligence or not: Mynard v. Syracuse etc. Ry. Co., 71 N. Y. 180, 27 Am. Rep. 28; Wilson v. New York Cent. R. Co., 97 N. Y. 87; Zimmer v. New York Cent. etc. R. R. Co., 137 N. Y. 460, 33 N. E. 642; Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490; Campe v. Weir, 28 Misc. Rep. 243, 58 N. Y. Supp. 1082; Keeney v. Grand Trunk Ry. Co., 59 Barb. 104; McKinney v. Jewett, 24 Hun, 19, affirmed in 90 N. Y. 267;

Lee v. Marsh, 28 How. Pr. 275; Knell v. United States etc. S. S. Co., 33 N. Y. Super. Ct. 423.

D. Doctrine in England.—In an elaborate review of the English decisions relative to the right of common carriers to limit their liability (in Peek v. North Staffordshire Ry. Co., 10 H. L. Cas. 473). Mr. Justice Blackburn traces the law of England with respect to the right of a carrier to exempt himself from responsibility for his or his servants' negligence. Prior to 1832 it appears that he could not, by any contract or notice, exempt himself from liability in cases of loss arising from "gross" negligence or fraud. "Gross" negligence in this connection was, however, said by Mr. Baron Parke, in Wyld v. Pickford, 8 Mees. & W. 442, 461, to mean "ordinary" negligence and up to 1832, therefore, the doctrine of the English courts permitted no limitation of liability for loss occasioned by negligence of the carrier or his servants: Birkett v. Willan, 2 Barn. & Ald. 356; Sleat v. Fogg, 5 Barn. & Ald. 342; Beal v. South Devon R. Co., 3 Hurl. & C. 337; Newborn v. Just, 2 Car. & P. 76; Beck v. Evans, 16 East, 244; Duff v. Dodd, 3 Brod. & B. 182. Between 1832 and 1854, however, the weight of authority permitted a carrier to limit his responsibility, even in cases of gross negligence, misconduct, or fraud on the part of his servants: Austin v. Manchester etc. Ry. Co., 10 Com. B. 454; Carr v. Lancashire etc. Ry. Co., 7 Ex. 707; Peek v. North Staffordshire Ry. Co., 10 H. L. Cas. 473.

The abuses arising from the ease with which carriers might, under these decisions, relieve themselves from all responsibility for the exercise of care led to the passage of the railway and canal traffic act of 1854, which prohibited any limitation of liability unless the contract containing it was signed by the parties and the stipulation itself was such "as should be adjudged by the court or judge before whom any questions relating thereto shall be tried to be just and reasonable." As to what conditions are "just and reasonable," and therefore permissible under the statute, see the following cases: Peek v. North Staffordshire Ry. Co., 10 H. L. Cas. 473; Simons v. G. W. Ry. Co., 18 Com. B. 805; Lewis v. G. W. Ry. Co., 5 Hurl. & N. 867; Beal v. South Devon Ry. Co., 3 Hurl. & C. 337; Aldredge v. Great Western Ry. Co., 15 Com. B., N. S., 582, 33 L. J. Com. P. 161; Pardington v. South Wales Ry., 1 Hurl. & N. 392; Gregory v. West Midland Ry., 2 Hurl. & C. 944; McManus v. Lancashire etc. Ry. Co., 4 Hurl. & N. 327; Roach v. N. E. Ry. Co., L. R. 2 Ex. 173; G. W. Ry. Co. v. Glenister, 29 L. T. 422; Harris v. Midland Ry. Co., 25 Week. Rep. 63; Allday v. G. W. Ry. Co., 34 L. J. Q. B. 5.

As the title of the act above referred to indicates, shipping is not within its purview, and the law of England is well settled that a ship owner may, by a specific stipulation to that effect, absolve himself from liability for any loss, even though it arises through negligence: Alexander v. Malcolmson, I. R. 2 C. L. 621; Boerselman v. Bailey (1895), 2 Q. B. 301, 64 L. J. Q. B. 707, 72 L. T. 677;

Norman v. Bennington, 25 Q. B. Div. 475, 59 L. J. Q. B. 490; The Duero, L. R. 2 Ad. & E. 393, 22 L. T. 37; The Cressington, 64 L. T. 329, 60 L. J. Adm. 25. And see to the same effect, Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. Rep. 30; Stevens v. Navigazione Generale Italiana, 89 Fed. 562.

2. For Whose Acts Carrier Responsible.

A. Responsibility of Express Companies for Acts of Carriers Employed by Them.—The rule (adhered to, as we have seen, in all of the United States, with the single exception of New York) that a common carrier may not, by any contract, exempt himself from responsibility for his negligence, applies with equal force to losses occasioned by the negligence of his agents or servants. Ordinarily, there is but little difficulty in determining who are servants of the carrier within the meaning of the rule. Where, however, a carrier employs agencies which are in a measure independent, the question becomes somewhat more involved. The most frequent instance of this is in the employment of railroad and steamship lines by express companies. Whatever doubts may have formerly existed, it is now well settled that express companies are common carriers (see monographic note to Bullard v. American Exp. Co., 61 Am. St. Rep. 360, and cases there cited), and cannot escape the liabilities of such carriers by stipulating in bills of lading or in shipping receipts that they shall be liable only as "forwarders": Alabama etc. Ry. Co. v. Thomas, 83 Ala. 343, 3 South. 802; Christenson v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174. And it is equally well settled that the companies whose conveyances these express companies use in the performance of their contracts are agents of the latter, and for their neglect the express companies are responsible. Of this responsibility the express company cannot devest itself by any stipulation in the bill of lading to the effect that it will not be liable for the neglect or default of the railroad or steamboat lines employed by it: Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174. See, also, Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Merchants' Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Deming v. Merchants' Cotton-Press etc. Co., 90 Tenn. 306, 17 S. W. 89.

B. Responsibility of Initial Carrier for Acts of Connecting Carriers—Right to Limit His Liability to His Own Line.—In a few cases it has been held that, where a carrier enters into an agreement for through carriage to a point beyond the terminus of his own line, the connecting carriers thereupon become his agents in the performance of that contract, and a stipulation in such contract that the initial carrier shall not be liable for any injury occurring beyond his own line, is therefore an attempt to exempt himself from liability for the negligence of his agents, and is, for that reason,

void: St. Louis etc. Ry. Co. v. Elgin Condensed Milk Co., 175 Ill. 557, 67 Am. St. Rep. 238, 51 N. E. 911; Ireland v. Mobile etc. R. Co., 20 Ky. Law Rep. 1586, 49 S. W. 188, 453; Galveston etc. Ry. Co. v. Allison, 59 Tex. 193; Gulf etc. R. Co. v. Vaughn (Tex. App.), 16 S. W. 775. See, also, Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Central etc. Ry. Co. v. Kavanaugh, 92 Fed. 56, 34 C. C. A. 203. The better rule and the great preponderance of authority is opposed to this; and the rule may be regarded as well settled that an initial carrier may, by special contract in the bill of lading, limit his responsibility to his own line: Jones v. Cincinnati etc. Ry. Co., 89 Ala. 376, 8 South. 61; Little Rock etc. Ry. Co. v. Odom, 63 Ark. 326, 38 S. W. 339; Central R. R. etc. Co. v. Avant, 80 Ga. 195, 5 S. E. 78; Chicago etc. Ry. Co. v. Montfort, 60 Ill. 175; Field v. Chicago etc. R. Co., 71 Ill. 458; Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417; Illinois Cent. Ry. Co. v. Carter, 165 Ill. 570, 46 N. E. 374; Coles v. Louisville etc. R. Co., 41 Ill. App. 607; Lehigh Valley Transp. Co. v. Pillsbury etc. Co., 92 Ill. App. 628; Mulligan v. Illinois Cent. Ry. Co., 36 Iowa, 181, 14 Am. Rep. 514; Berg v. Atchison etc. Ry. Co., 30 Kan. 561, 2 Pac. 639; Snider v. American Exp. Co., 63 Mo. 376; Gibson v. American Merchants' Union Exp. Co., 1 Hun, 389; Phifer v. Carolina Cent. Ry. Co., 89 N. C. 311, 45 Am. Rep. 687; Morgantown Mfg. Co. v. Ohio River etc. Ry. Co., 121 N. C. 514, 61 Am. St. Rep. 679, 28 S. E. 474; Keller v. Baltimore etc. Ry. Co., 196 Pa. St. 57, 46 Atl. 261; Bird v. Southern Ry. Co., 99 Tenn. 719, 63 Am. St. Rep. 856, 42 S. W. 451; Texas etc. Ry. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56, 14 S. W. 666; Galveston etc. Ry. Co. v. Short (Tex. Civ. App.), 25 S. W. 142; Fort Worth etc. Ry. Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846; The City of Clarksville, 94 Fed. 201; Railroad Co. v. Pratt, 89 U. S. 123; Fowles v. Great Western Ry. Co., 7 Ex. 699. As to a possible exception to this in cases where a copartnership exists between the connecting carriers, see the following cases: Phifer v. Carolina Cent. Ry. Co., 89 N. C. 311, 45 Am. Rep. 687; Gulf etc. Ry. Co. v. Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302; Galveston etc. Ry. Co. v. Houston (Tex. Civ. App.), 40 S. W. 842.

A limitation clause in a bill of lading, restricting the liability of a carrier to his own line, will not, it is held, avail the latter where the injury occurred on his own line, although the injuries were not apparent until later: Galveston etc. Ry. Co. v. Herring (Tex. App.), 24 S. W. 939; nor will it excuse an initial carrier from a misdelivery by the final carrier, which was the result of the former's negligent execution of the waybill: Illinois Cent. R. Co. v. Southern etc. Co., 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303.

C. **Effect of Stipulations as to What Persons are to be Considered Servants of Carriers.**—The determination of the question who is and who is not an agent of the carrier, such that the latter will be held liable for his negligence, cannot, of course, be affected by

any provision in the bill of lading that a particular person shall or shall not be considered such. Thus, in Missouri Pac. Ry. Co. v. Smith (Tex.), 16 S. W. 803, there was a stipulation in the bill of lading that the laborers furnished by the carrier to load and unload the livestock of the shipper should be deemed the employés of the latter while so engaged. The court very properly held this a mere device on the part of the carrier to exempt himself from liability for the negligence of those who were in fact its servants, saying: "Declaration, recital, or stipulation did not have the effect to make them employés of appellee. The facts only could make them so."

The same is held with reference to stipulations by which an agent of the owner accompanying livestock in transit is declared to be an employé of the carrier. Were this permitted to control, an injury to such person, caused by the negligence of servants of the railroad company, would be an injury caused by a "fellow-servant," for which the company could not be held liable. The courts, however, permit it to have no such operation, and hold that the true state of facts may nevertheless be shown. As is said in Missouri Pac. Ry. Co. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758: "It is a pretense, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relations of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so." And, to the same effect, see Missouri Pac. Ry. Co. v. Tietken, 49 Neb. 130, 59 Am. St. Rep. 526, 68 N. W. 336.

3. Particular Exemptions.

A. Against Liability for Loss by Fire.—A very frequent provision in bills of lading is that exempting the carrier from liability for loss or damage to the article caused by fire. Such exemption is of course valid and binding where the fire occasioning the loss is accidental and not the result of negligence on the part of the carrier or his servants: Indianapolis etc. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Rand v. Merchants' Disp. Transp. Co., 59 N. H. 363; Dillard v. Louisville etc. R. Co., 70 Tenn. 288; Louisville etc. Ry. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018; Louisville etc. Ry. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; York Mfg. Co. v. Central R. R. Co., 70 U. S. 107. Where, however, the proximate cause of the fire was the negligence of the carrier or his employés, a "fire clause," as it is called, cannot affect his responsibility for the loss or damage to the article occasioned by the fire. Any other rule would of course amount to permitting a carrier to stipulate against liability for negligence: Montgomery etc. R. Co. v. Edmonds, 41 Ala. 667; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473; Michigan Southern etc. R. R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Maxwell v. Southern Pac. Co., 48 La. Ann. 385, 19 South. 287; New Orleans

etc. R. Co. v. Faler, 58 Miss. 911; Levering v. Union Transp. etc. Co., 42 Mo. 88, 97 Am. Dec. 320; Steinweg v. Erie Ry. Co., 43 N. Y. 123, 3 Am. Rep. 673; Lamb v. Camden etc. Transp. Co., 46 N. Y. 271, 7 Am. Rep. 327; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358; Colton v. Cleveland etc. Ry. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Houston etc. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174.

B. Against Liability for Loss by Breakage.—Likewise a clause in a bill of lading which in terms exempts the carrier from any responsibility for breakage, while valid and binding where the breakage is not the result of the negligence of the carrier or his agents, cannot in any way affect his responsibility where the injury, although of the nature referred to in the exemption clause, was the result of negligent handling: Missouri Valley R. Co. v. Caldwell, 8 Kan. 244; Reno v. Hogan, 51 Ky. 63, 54 Am. Dec. 513; School Dist. v. Boston etc. R. R. Co., 102 Mass. 554, 3 Am. Rep. 502; Merriman v. The May Queen, Newb. Adm. 464, Fed. Cas. No. 9481.

C. Against Liability for Loss from Delay.—The same rule holds with reference to clauses seeking to relieve the carrier from responsibility for delay. The carrier may exempt himself from liability for injuries to goods or livestock arising from ordinary or unavoidable delays: Bartlett v. Pittsburgh etc. Ry. Co., 94 Ind. 281; Squire v. New York Cent. R. R. Co., 98 Mass. 239, 93 Am. Dec. 162. Where, however, the delay is the result of negligence, a provision that the carrier shall not be responsible for injuries caused by delay will not relieve him of his liability for any injuries resulting from the delay, which were proximately caused by the carrier's negligence: Berje v. Texas etc. Ry. Co., 37 La. Ann. 468; Alabama etc. Ry. Co. v. Sparks, 71 Miss. 757, 16 South. 263; Dunn v. Hannibal etc. R. Co., 68 Mo. 268; Missouri Pac. Ry. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312. See, also, in this connection, Illinois Cent. R. Co. v. Owens, 53 Ill. 391; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394; Hill v. Syracuse etc. Ry. Co., 73 N. Y. 351, 29 Am. Rep. 163; Nicholas v. New York Cent. etc. R. Co., 89 N. Y. 370.

D. That Owner Accompany and Care for Stock.—In making shipments of livestock, it is frequently provided in the bill of lading or shipping contract that the owner shall accompany and care for, load, and unload the stock during the time occupied in its transportation. These provisions and those which release the carrier from liability for injuries to the stock arising from causes unconnected with the control and management of the train—as, for instance, from injury or death by reason of overloading, heat, suffocation, etc.—are uniformly upheld as valid: Central R. R. etc. Co. v. Smitha, 85 Ala. 47, 4 South. 708; South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Georgia R. R.

Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia R. R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Mitchell v. Georgia R. Co., 66 Ga. 644; Myers v. Wabash etc. Ry. Co., 90 Mo. 98, 2 S. W. 263; Texas etc. Ry. Co. v. Davis (Tex. Civ. App.), 40 S. W. 167; Ormsby v. Union Pac. R. Co., 4 Fed. 706.

Stipulations of this kind cannot, however, relieve the carrier from liability for his own negligence. Even though the owner has agreed to load and unload, and to feed and otherwise care for the stock, it is the carrier's duty to furnish sufficent and proper facilities to enable the shipper to do this: Wabash etc. Ry. Co. v. Pratt, 15 Ill. App. 177; Taylor etc. Ry. Co. v. Montgomery (Tex. App.), 16 S. W. 178; Norfolk etc. Ry. Co. v. Harman, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490; Chesapeake etc. Ry. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935; Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; monographic note to Clarke v. Rochester etc. R. R. Co., 67 Am. Dec. 205.

E. That Shipper Examine Car and Assume Risk of Defects.—A common carrier cannot, by a stipulation in a bill of lading to the effect that the shipper assumes all risks arising from defects in the cars furnished him, escape liability for a failure to furnish suitable and proper cars. The duty to furnish suitable cars rests upon the carrier and not upon the shipper, and the failure to perform this obligation is negligence, from the consequences of which the carrier is not permitted to relieve himself: Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; St. Louis etc. Ry. Co. v. Lesser, 46 Ark. 236; Union Pac. Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Chicago etc. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 482; Potts v. Wabash etc. Ry. Co., 17 Mo. App. 394; Brown v. Wabash etc. Ry. Co., 18 Mo. App. 568; Galveston etc. Ry. Co. v Silegman (Tex. Civ. App.), 23 S. W. 298; Railroad Co. v. Pratt, 89 U. S. 123. In Wisconsin, it seems that the carrier will be released in such case if it appears that the shipper had actual knowledge of the defect, and accepted the car nevertheless: Leonard v. Whitcomb, 95 Wis. 646, 70 N. W. 817. See, also, Hawkins v. Great Western R. R. Co., 17 Mich. 57, 97 Am. Dec. 179. Where the carrier has discharged his duty in the matter of furnishing a suitable and safe car, he will not, of course, be responsible if the shipper, refusing to accept it, himself selects another car: Illinois Cent. R. Co. v. Hall, 58 Ill. 409.

c. Limitation of Amount Recoverable in Case of Loss.

1. In General.—In Capehart v. Seaboard etc. R. R. Co., 81 N. C. 438, 31 Am. Rep. 505, Ashe, J., remarks that "the right of a common carrier to limit or diminish his general liability by a special contract has given rise to as much, if not more, discussion and contrariety of opinion than any other question of law."

In no connection is the truth of this observation more apparent than in considering the right of such a carrier to restrict, by stipulations in the bill of lading, the amount which shall be recoverable by the shipper in case of loss or injury to the article shipped. The question has already been treated at some length in the monographic note to Chicago etc. Ry. Co. v. Chapman, 23 Am. St. Rep. 593, and with especial reference to the right of express carriers so to limit recovery, in the monographic note to Bullard v. American Exp. Co., 61 Am. St. Rep. 366.

2. Doctrine that Carrier may Limit Value Even for Loss by Negligence.

A. Statement of Doctrine.—According to one line of authorities, following the leading case of Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, a stipulation in a bill of lading as to the value of property, fairly and honestly made as the basis of the carrier's charges and responsibility, will be upheld, even where the loss was caused by his negligence, as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. The theory upon which these cases proceed is that such limitations of value do not in any way exempt the carrier from liability for negligence, since their only effect is to liquidate the amount for which the carrier shall be answerable in case the article is lost, whether through his negligence or otherwise. The amount of care which a carrier bestows upon an article committed to his care, and consequently the rates of carriage which he may reasonably demand, vary with the value of the article. "There is no justice," says Mr. Justice Blatchford, in Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, "in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume": South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Louisville etc. R. Co. v. Sherrod, 84 Ala. 178, 4 South. 29; Southern Ry. Co. v. Jones (Ala.), 31 South. 501; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Michalitschke v. Wells, Fargo & Co., 118 Cal. 683, 50 Pac. 847; Pierce v. Southern Pacific Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302; Lawrence v. New York etc. R. Co., 36 Conn. 63;

Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870; Central of Georgia R. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970; Rosenfeld v. Peoria etc. Ry. Co., 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Adams Exp. Co. v. Carnahan (Ind. App.), 63 N. E. 245; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665; Brehme v. Adams Exp. Co., 25 Md. 328; Squire v. New York Cent. R. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston etc. R. Co., 144 Mass. 284, 10 N. E. 836; Graves v. Adams Exp. Co., 176 Mass. 280, 57 N. E. 462; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Moulton v. St. Paul etc. Ry. Co., 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497; Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072; Vaughn v. Wabash R. Co., 62 Mo. App. 461; Crow v. Chicago etc. R. Co., 57 Mo. App. 135; Rogan v. Wabash Ry. Co., 51 Mo. App. 665; Harvey v. Terre Haute etc. R. Co., 74 Mo. 538; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328; Duntley v. Boston etc. R. R. Co., 66 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Zimmer v. New York Cent. etc. R. R. Co., 137 N. Y. 460, 33 N. E. 642; White v. Weir, 53 N. Y. Supp. 465, 33 App. Div. 145; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 22 Atl. 1113; Starnes v. Louisville etc. R. R. Co., 91 Tenn. 516, 19 S. W. 675; Richmond etc. R. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749; Zouch v. Chesapeake etc. Ry. Co., 36 W. Va. 524, 15 S. E. 185; Ullman v. Chicago etc. Ry. Co. (Wis.), 88 N. W. 41; Loeser v. Chicago etc. Ry. Co., 94 Wis. 571, 69 N. W. 372; Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151; Sayles v. New York etc. Ry. Co., 81 Fed. 326; Jennings v. Smith, 106 Fed. 139, 45 C. C. A. 249; Metropolitan Trust Co. v. Toledo etc. Ry. Co., 107 Fed. 628.

B. **Limitation must not be Arbitrary.**—In many of these cases insistence is laid upon the rule that such limitations, in order that they be valid and binding, must be contracts between the shipper and the carrier with reference to a value to which the charges and responsibilities of the latter shall be proportioned, and not mere arbitrary limitations of his liability by the carrier. The line of distinction is said to lie between those stipulations the object of which is to secure a fair and reasonable value upon which to base the terms of the contract of shipment, and those the purpose of which is merely to place a limit upon the amount for which the carrier shall be liable. The former are reasonable and will be sustained. The latter are mere attempts on the part of the carrier to limit his liability for losses arising through his own negligence, and as to losses so caused are unreasonable and not binding on the shipper: Alair v. Northern Pac. Ry. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072; Ullman v. Chicago etc. Ry. Co. (Wis.), 88 N. W. 41. And to the same effect, see Georgia R. R. etc. Co. v. Keener, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287; Central of Georgia Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970;

Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417; Baltimore etc. Ry. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Rosenfeld v. Peoria etc. Ry. Co., 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328; Doan v. St. Louis etc. Co., 38 Mo. App. 408.

C. Various Tests of Validity.—As an abstraction, the distinction is generally recognized. In its application, however, different courts take widely divergent views as to what is an agreed limitation of value as distinguished from a mere arbitrary restriction of the amount of recovery on the part of the carrier.

1. In some cases, for instance, a distinction is made in this connection between a stipulation providing that the "value" or "limit of recovery" in case of loss shall not exceed a certain specified amount and those in which the "value" is agreed to be a certain amount. The distinction is said to be that "a limitation of the carrier's liability is a provision solely in the carrier's favor, as the shipper, in case of loss, would still have to prove the value of the article to be equal to or greater than the amount limited in order to recover the limit, whereas in a case of liquidated damages the amount agreed upon is conclusive upon both parties": Conover v. Pacific Exp. Co., 40 Mo. App. 31. And the same distinction is taken in the following cases: Kellerman v. Kansas City etc. Co., 68 Mo. App. 255; Louisville etc. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Eels v. St. Louis etc. Ry. Co., 52 Fed. 903; Calderon v. Atlas S. S. Co., 69 Fed. 574, 16 C. C. A. 332, per Wallace, C. J, dissenting. There seems, however, to be no difference in principle between a case where the contract or shipment is understandingly made on the basis of a "maximum" value, and that where the rates of freight are settled with reference to an agreed "actual" value. In either case, the parties have agreed to a certain value as the basis of negotiation, and should be held thereto. The validity of any such distinction has, moreover, been denied in at least two well-considered cases: Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072; Ullman v. Chicago etc. Ry. Co. (Wis.), 88 N. W. 41; and is by no means well established.

2. In other cases an attempt has been made to distinguish between cases where the limit of value was made by the shipper or inserted by the carrier, such cases holding the former to be contracts of valuation, while the latter are deemed to be mere attempts by the carrier to limit his responsibility for negligence: See Doan v. St. Louis etc. Ry. Co., 38 Mo. App. 408. This objection was urged in the leading case of Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, and met with the following answer: "A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It

is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the value inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for the distinction. The valuation named was the "agreed valuation"—the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

3. Still another line of discrimination suggested is whether or not the limitation stated in the bill of lading is disproportionate to the real value of the article: South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649. In the very recent case of Southern Ry. Co. v. Jones (Ala.), 31 South. 501, the rule prohibiting disproportionate limitations is said to be founded on considerations of public policy. The court, speaking through McClellan, C. J., continues as follows: "In determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances, and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed as to the real value of property transported by them."

This language is broad, and would seem to cover every case where the value named in the bill of lading is greatly disproportionate to the real value of the article shipped. If such is the operation of the rule, the doctrine of Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, would seem to be preferable. In that case a horse worth two thousand one hundred dollars was shipped on a contract containing a stipulation in which it was "agreed that the value of the livestock to be transported does not exceed the following mentioned sums, to wit: Each horse, one hundred dollars, etc." In spite of the greatly

disproportionate values it was held that the stipulation was valid, in the absence of knowledge on the part of the carrier that the horse was worth a great deal more than the amount therein named, the court saying: "The agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals. Ordinarily, they would know nothing about the matter except what they learned from the shipper's statement. Presumably, the charges for transportation are to a considerable extent based on the value of the property. Moreover, the measure of care on part of the carrier will naturally be commensurate with the value of the property intrusted to him. By executing this contract the plaintiff stipulated, and in effect represented to defendant, that his horses were not worth to exceed one hundred dollars each, and that the charges for transportation should be based on that valuation. Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable."

From the foregoing it is apparent that while a distinction between a mere arbitrary limitation by the carrier of the amount of recovery and a valuation agreed upon by both carrier and shipper as a basis for terms of carriage is quite generally recognized, the authorities are not in harmony as to the proper tests for determining whether a stipulation is one or the other, and what is "arbitrary" and therefore void in the opinion of one court is readily sustained by another. With respect to certain stipulations, however, the frequency with which they have been under consideration has rendered their status in this regard somewhat definite.

D. Limiting Recovery to Certain Amount Unless Real Value Stated.—It is held that a stipulation limiting the value of the article shipped to a certain sum unless a greater value was expressed or declared is valid and binding on the shipper. "Even when the common-law liability of carriers was enforced most vigorously, the courts always upheld limitations of it imposed for the purpose of procuring a full disclosure of the value of the property, especially of articles of unusual value, or subject to extra hazard": Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072. See, also, Lawrence v. New York etc. R. R. Co., 36 Conn. 63; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Kallman v. United States Exp. Co., 3 Kan. 205; Brehme v. Adams Exp. Co., 25 Md. 328; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Duntley v. Boston etc. R. R. Co., 66 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; White v. Weir, 53 N. Y. Supp. 465, 33 App. Div. 145; Tay v. Long Island R. Co., 56 N. Y. Supp. 182; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 22 Atl. 1113; The Bermuda, 29 Fed. 399; Calderon v. Atlas S. S. Co., 69 Fed. 574, 16 C. C. A. 332; and monographic note to Bullard v. American

Exp. Co., 61 Am. St. Rep. 366. Under a stipulation such as this, it is the duty of the shipper to disclose, rather than of the carrier to demand, the true value of the article, and silence on the part of the shipper will be sufficient to limit recovery in case of loss to the amount stated in the bill of lading: Kallman v. United States Exp. Co., 3 Kan. 205; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. Where, however, the carrier has knowledge of the actual value of the package, or its value is apparent, his failure to state that value in the bill of lading cannot affect the right of the shipper to recover the full amount, although by the terms of that instrument the carrier was liable in case of loss only for the amount therein stated: Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Orndorff v. Adams Exp. Co., 66 Ky. 194, 96 Am. Dec. 207; Kember v. Southern Exp. Co., 22 La. Ann. 158, 2 Am. Rep. 719. See, also, Overland Mail etc. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682.

E. **Limiting Recovery to Value at Time and Place of Shipment.**—Likewise it has been held that a stipulation in a bill of lading that the value of the article at the place and date of shipment shall be the basis of recovery in case of loss is reasonable and valid: Chicago etc. Ry. Co. v. Harmon, 17 Ill. App. 640; Tibbits v. Rock Island etc. Ry. Co., 49 Ill. App. 567; Rogan v. Wabash Ry. Co., 51 Mo. App. 665; Hance v. Wabash etc. Ry. Co., 56 Mo. App. 476; Southern Pac. Co. v. Phillipson (Tex. Civ. App.), 39 S. W. 958. Such a provision cannot, however, apply where the carrier has been guilty of conversion: Erie Dispatch Co. v. Johnson, 87 Tenn. 490, 11 S. W. 441. In Shea v. Minneapolis etc. Ry. Co., 63 Minn. 228, 65 N. W. 458, it was said that a condition in a bill of lading which requires the amount of loss or damage incurred by a carrier to be computed at the value of the property at the time and place of shipment, ignores the fact that freight charges may have been paid by the consignee upon property injured by the carrier's negligence, and wholly fails to provide for restitution of the amount which may have been paid, must be declared unjust, unreasonable, and against public policy. "On further reflection and consideration," however, the court held in Davis v. New York etc. Ry. Co., 70 Minn. 37, 72 N. W. 823, that such a stipulation must be construed as permitting the recovery of freight charges which have been paid the shipper, and was sustainable for that reason.

3. **Doctrine that Carrier cannot Limit Value in Case of Loss by Negligence.**—In a number of states the courts do not permit the carrier, by any contract with the shipper, to limit his liability, where the loss is caused by his negligence, to anything less in amount than the actual damage suffered by the shipper. Under the view taken by these courts, an attempt by the carrier to lessen the amount recoverable where his negligence has caused the damage is merely one method of seeking to limit his liability for negligence. The position of the courts taking this view is well ex-

pressed in Louisville etc. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311 (although the views there expressed are not the rule in Tennessee: See Starnes v. Louisville R. R. Co., 91 Tenn. 516, 19 S. W. 675), in the following language: "The carrier cannot by contract exempt itself from a whole or any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in either case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that a carrier may not absolve itself from liability for the whole value of property lost or destroyed through his negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither, The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts." To the same effect, see Galt v. Adams Exp. Co., 4 MacAr. (D. C.) 124, 48 Am. Rep. 742; Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417; Chicago etc. Ry. Co. v. Calumet Stock Farm (principal case), 194 Ill. 9, ante, p. 68, 61 N. E. 1095; Chicago etc. R. Co. v. Harmon, 17 Ill. App. 640; Chicago etc. R. Co. v. Grimes, 71 Ill. App. 397; Orndorff v. Adams Exp. Co., 66 Ky. 194, 96 Am. Dec. 207; Louisville etc. R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590; Southern Exp. Co. v. Moon, 39 Miss. 822; Chicago etc. Ry. Co. v. Abels, 60 Miss. 1017; Illinois Cent. R. R. Co. v. Bogard, 78 Miss. 11, 27 South. 879; Chicago etc. Ry. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183; United States Exp. Co. v. Backman, 28 Ohio St. 144; Adams Exp. Co. v. Holmes (Pa.), 9 Atl. 166; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 60 Am. Rep. 360, 7 Atl. 134; Galveston etc. Ry. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Fort Worth etc. Ry. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Gulf etc. R. Co. v. Eddius, 7 Tex. Civ. App. 116, 26 S. W. 161; Houston etc. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308. Whatever may be the force of this position, the weight of authority is opposed to it: See supra, p. 106.

4. **In Case of Partial Loss.**—Where it is provided in the bill of lading that the amount recoverable in case of "loss or damage"

shall not exceed a specified sum, the question arises as to the amount recoverable where the article is not lost, but merely injured. The parties may, of course, by express provision to that effect, stipulate that in case of partial loss the damages shall be proportioned on the basis of the sum named as the maximum limit, and effect will be given such stipulation: St. Louis etc. R. R. Co. v. Lesser, 46 Ark. 236. Where this is not done, however, the question becomes one of construction. It is quite uniformly held that such stipulations are to be construed as permitting recovery for the damage actually done, the amount recoverable, however, not to exceed that agreed upon as compensation for a total loss: Georgia R. R. etc. Co. v. Reid, 91 Ga. 377, 17 S. E. 934; Starnes v. Louisville etc. R. R. Co., 91 Tenn. 516, 19 S. W. 675. See, however, Goodman v. Missouri Pac. etc. Ry. Co., 71 Mo. App. 460.

d. Stipulation for Notice of Claim for Loss or Damage.

1. Validity of.—It is well settled that the carrier may, by stipulation in a bill of lading, provide that notice of any claim for loss or damage be given by the shipper within a reasonable and prescribed time, and in a certain manner, as a condition precedent to his liability for such loss. Such a stipulation, as is said in Southern Exp. Co. v. Caldwell, 88 U. S. 264, "contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity which the strictest rules of the common law ever required." See, also, Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Kansas etc. Ry. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515; Baxter v. Louisville etc. Ry. Co., 165 Ill. 78, 45 N. E. 1003; Coles v. Louisville etc. R. Co., 41 Ill. App. 607; Case v. Cleveland etc. R. Co., 11 Ind. App. 517, 39 N. E. 426; Baltimore etc. Ry. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Sprague v. Missouri Pac. Ry. Co., 34 Kan. 347, 8 Pac. 465; Atchison etc. Ry. Co. v. Mason, 4 Kan. App. 391, 46 Pac. 31; Owen v. Louisville etc. Ry. Co., 87 Ky. 626, 9 S. W. 698; Armstrong v. Chicago etc. Ry. Co., 53 Minn. 183, 54 N. W. 1059; Ward v. Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28; Dawson v. St. Louis etc. Ry. Co., 76 Mo. 514; Brown v. Wabash etc. Ry. Co., 18 Mo. App. 568; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394; Osterhoudt v. Southern Pac. Co., 62 N. Y. Supp. 134, 47 App. Div. 146; Wood v. Southern Ry. Co., 118 N. C. 1056, 24 S. E. 704; Selby v. Wilmington etc. R. R. Co., 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; Pavitt v. Lehigh Valley R. R. Co., 153 Pa. St. 302, 25 Atl. 1107; Gulf etc. Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913; Lewis v. Great Western R. R. Co., 5 Hurl. & N. 867.

2. Must be Reasonable.

A. In General.—The one essential of stipulations of this nature is that they be reasonable. This is, however, purely relative, and

a stipulation perfectly reasonable under one state of facts would be quite as unreasonable under another. Whether in any particular case the stipulation under consideration is valid is, therefore, dependent upon the peculiar facts of that case. From the very nature of the requirement it is evident that no helpful general rule can here be laid down.

B. Notice within Specified Time.—Thus a stipulation providing for notice of claim within thirty hours after delivery was held reasonable in St. Louis etc. Ry. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215, while one allowing thirty-six hours' time was held unreasonable and void in Jennings v. Grand Trunk etc. Ry. Co., 127 N. Y. 438, 28 N. E. 394; and the reasonableness of a similar provision in Texas etc. Ry. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56, 14 S. W. 666, was held a proper question for the consideration of the jury. A provision for such notice within thirty days after delivery was deemed reasonable in American Grocery Co. v. Staten Island R. R. Co., 51 N. Y. Supp. 307, 23 Misc. Rep. 356; Metropolitan Trust Co. v. Toledo etc. R. Co., 107 Fed. 628; while the same period of time was held unreasonable in Capehart v. Seaboard etc. R. R. Co., 81 N. C. 438, 31 Am. Rep. 505. So a stipulation for notice ten days after removal of the stock, as in Case v. Cleveland etc. R. Co., 11 Ind. App. 517, 39 N. E. 426, and Grieve v. Illinois Cent. R. Co., 104 Iowa, 659, 74 N. W. 192, or within ten days after knowledge of the loss, as in The Arctic Bird, 109 Fed. 167, has been held reasonable. Five days after delivery has frequently been held a reasonable length of time for such notice: Black v. Wabash etc. Ry. Co., 111 Ill. 351, 53 Am. Rep. 628, affirming Wabash etc. Ry. Co. v. Black, 11 Ill. App. 465; Cleveland etc. Ry. Co. v. Newlin, 74 Ill. App. 638; Chicago etc. Ry. Co. v. Bozarth, 91 Ill. App. 68; Anderson v. Lake Shore etc. Ry. Co., 26 Ind. App. 196, 59 N. E. 396; Dawson v. St. Louis etc. Ry. Co., 76 Mo. 514; Brown v. Wabash etc. Ry. Co., 18 Mo. App. 568; while thirty days from the date of the bill of lading is, on the other hand, held unreasonable: Southern Exp. Co. v. Bank of Tupelo, 108 Ala. 517, 18 South. 664; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Dixie Cigar Co. v. Southern Exp. Co., 120 N. C. 348, 58 Am. St. Rep. 795, 27 S. E. 73. Contra, see United States Exp. Co. v. Harris, 51 Ind. 127; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. Rep. 278, reversing 75 Fed. 74, 94 Fed. 180, 36 C. C. A. 135.

C. Notice Before Removal and Mingling of Livestock.—A frequent stipulation in bills of lading, particularly where livestock is the subject of the shipment, is a provision requiring that the owner give notice of a claim for loss or injury before the stock is removed from the place of delivery or mingled with other stock. Such provisions are in general upheld as just and reasonable. Their object is of course to protect the carrier from any false or fictitious claim for injury and loss, and to allow of inspection and ascertainment of the damage suffered while the stock shipped is

still capable of identification. Where, therefore, no extraneous facts appear rendering them unreasonable, stipulations of this nature are sustained as reasonable and valid: Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Kansas etc. Ry. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515; Sprague v. Missouri Pac. Ry. Co., 34 Kan. 347, 8 Pac. 465; Atchison etc. Ry. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Missouri etc. Ry. Co. v. Kirkham, 63 Kan. 255, 65 Pac. 261; Owen v. Louisville etc. Ry. Co., 87 Ky. 626, 9 S. W. 698; Rice v. Kansas Pac. Ry. Co., 63 Mo. 314; Selby v. Wilmington etc. Ry. Co., 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; Wood v. Southern Ry. Co., 118 N. C. 1056, 24 S. E. 704. See, also, The St. Hubert, 107 Fed. 727, 46 C. C. A. 603.

D. **Where Party to Whom Notice is to be Given is not Named.** Such a provision is not, however, in and of itself reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract. Thus it is held that where the destination of the shipment is beyond the terminus of the carrier's line, a provision in a bill of lading issued by him, requiring that the shipper give notice of a claim for loss or damage to an officer or the nearest station agent of the carrier, before removing or mingling the stock with other stock, is unreasonable and void where it fails to state the name or the location of the nearest station agent or of the officer to whom the notice is to be given. Such a stipulation, to be reasonable, must be both certain and definite, and cannot throw upon the shipper the burden of holding his cattle at the place of destination until he may be able to ascertain who is the proper officer or where the nearest station agent resides: Baxter v. Louisville etc. Ry. Co., 165 Ill. 78, 45 N. E. 1003; Smitha v. Louisville etc. Ry. Co., 86 Tenn. 198, 6 S. W. 209; Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Norfolk etc. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

E. **Where Carrier has no Agent at Destination.**—The same is true where it appears that the carrier had no agent or officer at the place of delivery. "If a carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agent, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier": Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574. To the same effect, Coles v. Louisville etc. R. R. Co., 41 Ill. App. 607; Engesether v. Great Northern Ry. Co., 65 Minn. 168, 68 N. W. 4; Carpenter v. Eastern Ry. Co., 67 Minn. 188, 69 N. W. 720; Good v. Galveston etc. Ry. Co. (Tex.), 11 S. W. 854; Missouri Pac. Ry. Co. v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78; Galveston etc. Ry. Co. v. Short

(Tex. Civ. App.), 25 S. W. 142; Houston etc. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308.

F. **Where Damage is not Apparent.**—A provision for notice is unreasonable where the damage done is not for any reason apparent or capable of being estimated within the time provided for giving notice. A carrier cannot reasonably require that the shipper shall give notice of a claim for damages before the injury as its extent can be discovered by the latter in the exercise of due diligence: Harned v. Missouri Pac. Ry. Co., 51 Mo. App. 482; Popham v. Barnard, 77 Mo. App. 619; Gulf etc. Ry. Co. v. Stanley, 89 Tex. 42, 33 S. W. 109; Houston etc. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; Missouri etc. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

G. **When Substantial Compliance Sufficient.**—When literal compliance with a stipulation requiring notice of claims to be presented within a certain time is rendered impracticable under the circumstances, substantial compliance is all that is required. The purpose of such stipulations is to permit the carrier to make a prompt investigation of the claim. If, therefore, notice is given as soon as practicable, although it may not be within the period specified in the bill of lading, the object of the provision is accomplished, and the carrier will not be heard to object that there has not been literal compliance: Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Case v. Cleveland etc. Ry. Co., 11 Ind. App. 517, 39 N. E. 426; Goggin v. Kansas Pac. Ry. Co., 12 Kan. 416; Atchison etc. Ry. Co. v. Temple, 47 Kan. 7, 27 Pac. 98; Atchison etc. Ry. Co. v. Collins, 47 Kan. 11, 27 Pac. 99; Hinton v. Eastern Ry. Co., 72 Minn. 339, 75 N. W. 373; Rice v. Kansas Pac. Ry. Co., 63 Mo. 314; Richardson v. Chicago etc. R. R. Co., 149 Mo. 311, 50 S. W. 782; Baker v. Missouri Pac. Ry. Co., 19 Mo. App. 321; Richardson v. Chicago etc. Ry. Co., 62 Mo. App. 1; Chicago etc. Ry. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508; Wood v. Southern Ry. Co., 118 N. C. 1056, 24 S. E. 704. Where, however, the circumstances surrounding the shipper were not such as to render it impracticable to give notice in the required manner and within the specified time, he will be bound to give the notice in that manner and at that time. In such case if written notice was provided for in the bill of lading, verbal notice will be insufficient: Goggin v. Kansas Pac. Ry. Co., 12 Kan. 416.

H. **Necessity for Notice Where Time Allowed Therefor is Unreasonably Short.**—The mere fact that the period named in the bill of lading as that within which notice of claims must be given is unreasonably short does not excuse the shipper from giving any notice at all. In such case the limitation of time is void, but the provision for notice still remains, and is to be complied with before the expiration of a reasonable time: Osterhoudt v. Southern Pac. Co., 62 N. Y. Supp. 134, 47 App. Div. 146; The St. Hubert, 102 Fed. 362.

e. **Stipulations Limiting Time within Which Suit may be Brought for Loss or Damage.**—Similar in character to the stipulations just considered prescribing a certain time within which notice of loss must be given, are the provisions frequently met with in bills of lading which require that any action to recover for loss or damage to the article shipped should be begun within a specified period. The parties may, if they see fit, fix by agreement a shorter time for the bringing of suit on the contract than that provided by the statute of limitations, and if the period therein limited is reasonable, suit must be brought within that time or the shipper's right of action will be barred. Such a provision is prohibited by no rule of law nor by any consideration of public policy: Ginn v. Ogdensburg Transit Co., 85 Fed. 985, 29 C. C. A. 521.

It must, however, be reasonable, and if the period of time specified is such that under the facts of the particular case the shipper could not with reasonable diligence be enabled to bring suit before it expired, the attempted limitation is void. Thus, a provision that suit must be brought within thirty days after the loss or damage occurred has been held unreasonable where it appeared that the transit might reasonably consume the whole of that time: Central Vermont R. Co. v. Saper, 59 Fed. 879. A period of forty days has, on the other hand, been repeatedly held to be a reasonable limitation: Gulf etc. Ry. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; Gulf etc. Ry. Co. v. Hume, 87 Tex. 211, 27 S. W. 110; Galveston etc. Ry. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298; Gulf etc. Ry. Co. v. White (Tex. Civ. App.), 32 S. W. 322. Sixty days was held reasonable in Thompson v. Chicago etc. R. Co., 22 Mo. App. 321; and provisions requiring suit to be brought within three months are held just and valid: North British etc. Ins. Co. v. Central Vermont Ry. Co., 40 N. Y. Supp. 1113, 9 App. Div. 4; Ginn v. Ogdensburgh Transit Co., 85 Fed. 985, 29 C. C. A. 521.

f. **Waiver by Carrier of Performance of Stipulations by Shipper.**—Provisions of this nature, whether they provide for notice of claim within a certain time or for a period limiting the right of the shipper to sue, are provisions for the carrier's benefit, and may be waived in whole or in part by him. The waiver need not be, and seldom is, express, but may be implied from the conduct of the carrier. Thus where a verified notice of loss is required, receipt by the carrier of an unsworn notice without objection to the lack of verification will be regarded as a waiver of that requirement: Wabash etc. Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Hess v. Missouri Pac. Ry. Co., 40 Mo. App. 202; Illinois Cent. R. R. Co. v. Bogard, 78 Miss. 11, 27 South. 879; Cleveland etc. Ry. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198. So a requirement that the notice be written will be deemed to have been waived if the carrier receive verbal notice without objection: Hinkle v. Southern Ry. Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

Likewise, if a carrier accepts notice of loss after the period provided in the bill of lading for giving such notice has expired, and does not specify the lapse of time as an objection to its validity, this requirement will be regarded as waived: Harned v. Missouri Pac. Ry. Co., 51 Mo. App. 482; Rice v. Kansas Pac. Ry., 63 Mo. 314; Marrus v. New Haven Steamboat Co., 30 Misc. Rep. 421, 62 N. Y. Supp. 474. And see generally upon the question of waiver, Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; Hamilton v. Wabash Ry. Co., 80 Mo. App. 597; Merrill v. American Exp. Co., 62 N. H. 514; United States Watch-case Co. v. Southern Exp. Co., 120 N. C. 351, 27 S. E. 74.

g. **Estoppel of Carrier to Demand Performance of Stipulations by Shipper.**—A carrier may by his conduct have estopped himself from insistence upon compliance with the terms of the bill of lading. This he is held to do, with respect to limitations upon the time within which an action for loss or injury to the article shipped must be brought, whenever by negotiations for settlement or otherwise, he so acts as to justify a reasonable belief on the part of the shipper that this claim will be settled without suit. If the shipper, acting on this belief, does not institute his suit until the time provided in the bill of lading has elapsed, the carrier will nevertheless be estopped from invoking the limitation: Gulf etc. Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913; Gulf etc. Ry. Co. v. Trawick, 80 Tex. 270, 18 S. W. 948; Galveston etc. Ry. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298. If, however, notwithstanding such negotiations the shipper still had ample time after they had ceased within which to begin his action before the stipulated time elapsed, the carrier cannot be estopped from claiming the benefit of the stipulation: Thompson v. Chicago etc. R. Co., 22 Mo. App. 321.

IV. Construction of Stipulations Limiting Carrier's Liability.

a. **General Rule—Construed Strictly Against Carrier.**—It is an elementary rule of construction that if a written contract reasonably admits of two constructions that one is to be adopted which is least favorable to the party whose language it is. "To no class of contracts has this rule been applied with more stringency than to those in which common carriers seek to limit their liability as it exists at common law. In general, not only are the bills of lading drawn by the carrier and tendered to the shipper to be accepted by him without alteration, but they are also executed upon forms prepared for the purpose of protecting the interest of the carrier, with all the care and ability which experience in the business and professional skill can bring to bear upon the subject. The rule does not require that a strained construction should be put upon the contract of shipment in order to favor the shipper, but rather that in case of a reasonable doubt

as to which of two constructions best accords with the intent of the parties, that should prevail which is least favorable to the parties": Amory Mfg. Co. v. Gulf etc. Ry. Co., 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856.

The courts, moreover, look with jealousy upon the attempts of common carriers to free themselves from the responsibilities placed upon them by the policy of the common law, because of the public nature of their employment. The inequality of the parties to these contracts has already been discussed. All these considerations, therefore, have led to the adoption of a rule now indubitably established, that any limitation of liability by common carrier in a bill of lading will, in case of ambiguity, be strictly construed and that construction adopted which is the most favorable to the shipper: Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Alabama etc. Ry. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119, 7 South. 762; Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302; St. Louis etc. Ry. Co. v. Smuck, 49 Ind. 302; Rosenfeld v. Peoria etc. Ry. Co., 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Southern Exp. Co. v. Moon, 39 Miss. 822; Illinois Cent. R. Co. v. Lancashire Co. (Miss.), 30 South. 43; Dunn v. Hannibal etc. Ry. Co., 68 Mo. 268; Standard Milling Co. v. White Line etc. Co., 122 Mo. 258, 26 S. W. 704; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894; Amory Mfg. Co. v. Gulf etc. Ry. Co., 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856; Cream City Ry. Co. v. Chicago etc. Ry. Co., 63 Wis. 93, 53 Am. Rep. 267, 23 N. W. 425; New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 344; Compagnie de Navigazione etc. v. Brauer, 168 U. S. 104, 18 Sup. Ct. Rep. 12; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. Rep. 278; Calderon v. Atlas S. S. Co., 69 Fed. 574, 16 C. C. A. 332; N. K. Fairbank etc. Co. v. Cincinnati etc. Ry., 81 Fed. 289; Taylor v. Liverpool etc. Co., L. R. 2 Q. B. 546.

b. Construed not to Cover Losses Caused by Negligence.—The most frequent application of this rule is in the construction of stipulations in bills of lading which might, under one interpretation, cover cases where the loss arose from the negligence of the carrier. Such stipulations are quite uniformly construed as not being intended to cover losses of which the negligence of the carrier has been the cause. Thus a limitation limiting the liability of a carrier in case of loss by "fire" is held not to include a fire caused by the negligence of the carrier or his servants: Montgomery etc. R. Co. v. Edmonds, 41 Ala. 667; Insurance Company of North America v. Lake Erie etc. R. Co., 152 Ind. 333, 53 N. E. 382; Missouri Pac. Ry. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455. The language must be such as necessarily evinces an intention on the part of both parties that losses arising from negligence shall

be included, and is not to be deduced from exemptions in general terms: See, in addition to cases above cited, Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Savannah etc. Ry. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219; Sager v. Portsmouth etc. R. R. Co., 31 Me. 228, 50 Am. Dec. 659; Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Mynard v. Syracuse etc. Ry. Co., 71 N. Y. 180, 27 Am. Rep. 28; Zimmer v. New York Cent. etc. Ry. Co., 137 N. Y. 460, 33 N. E. 642; Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44; Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490; Morris v. Weir, 20 Misc. Rep. 586, 46 N. Y. Supp. 413; Bermel v. New York etc. Ry. Co., 70 N. Y. Supp. 804, 62 App. Div. 389; Blum v. Monahan, 36 Misc. Rep. 179, 73 N. Y. Supp. 162, Keeney v. Grand Trunk R. Co., 59 Barb. 104; Rubens v. Ludgate Hill S. S. Co., 65 Hun, 625, 20 N. Y. Supp. 481; The Titania, 19 Fed. 101; New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 344; De Rothschild v. Royal Mail etc. Co., 7 Ex. 734.

c. **Applicable Only to Claims Arising on Bill of Lading.**—The various stipulations found in bills of lading and already discussed are construed as intended to apply only when the injury complained of arose upon the bill of lading. They do not apply and were not intended to cover cases in which the cause of action arises outside of the special contract contained in the bill of lading. Thus a limitation of the amount recoverable in case of loss is inapplicable to an action for failure to return to a vendor who has exercised the right of stoppage in transitu: Rosenthal v. Weir, 54 App. Div. 275, 66 N. Y. Supp. 841. Nor is a provision that suit for loss or damage must be brought within a certain time applicable to an action for a statutory penalty for failure to feed and water a shipment of livestock: Gulf etc. Ry. Co. v. Gray (Tex. App.), 24 S. W. 837. See, for other instances where provisions of a like nature were held inapplicable, Louisville etc. R. Co. v. Kelsey, 89 Ala. 287, 7 South. 648; Green v. Pacific Exp. Co., 37 Mo. App. 537; Gulf etc. Ry. Co. v. Trawick, 80 Tex. 270, 18 S. W. 948.

d. **Inapplicable to Claims for Delay.**—Similarly it is held that provisions in a bill of lading which limit either the time within which notice of loss must be given, or within which suit must be brought for loss or damage to the article shipped do not apply to cases where the injury for which recovery is sought was occasioned by a change in the market, during an unreasonable delay of the shipment by the carrier. This is not properly "loss or damage" to the article shipped: Kramer v. Chicago etc. Ry. Co., 101 Iowa, 178, 70 N. W. 119; Baltimore etc. Exp. Co. v. Cooper, 66 Miss. 558, 14 Am. St. Rep. 387, 6 South. 327; D. Klass etc. Co. v. Wabash Ry. Co., 80 Mo. App. 164. See, also, McCarty v. Gulf etc. Ry. Co., 79 Tex. 33. Where, however, the bill of lading provides for notice of claim for "damages which may accrue to the second party (shipper) under this contract," damage occasioned by delay in forward-

ing the goods was properly held included by the terms of the stipulation: Hamilton v. Wabash Ry. Co., 80 Mo. App. 597, distinguishing Leonard v. Chicago etc. Ry. Co., 57 Mo. App. 366.

V. Burden of Proof.

a. **Carrier must Bring Loss Within Exemptions of Bill of Lading.**—Where goods have been lost or damaged, and the carrier seeks to defend himself from liability therefor on the ground that the injury arose from a cause within the exemptions of the bill of lading, the rule is well settled that the carrier must show that the injury was so caused. He has the burden of proving that the loss is one from liability for which he is excepted by the provisions of the bill of lading. The facts are peculiarly within his knowledge, and it is but reasonable to require him to bring the loss within terms of the contract: Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Little Rock etc. Ry. Co. v. Talbot, 39 Ark. 523; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Bonfiglio v. Lake Shore etc. Ry. Co., 125 Mich. 476, 84 N. W. 722; Shriver v. Sioux City etc. Ry. Co., 24 Minn. 506, 31 Am. Rep. 353; Newberger Cotton Co. v. Illinois Cent. Ry. Co., 75 Miss. 303, 23 South. 186; Read v. St. Louis etc. R. Co., 60 Mo. 199; Mitchell v. Carolina Cent. R. R. Co., 124 N. C. 236, 32 S. E. 671; Gaines v. Union Transp. etc. Co., 28 Ohio St. 418; Colton v. Cleveland etc. Ry. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Johnstone v. Richmond etc. Ry. Co., 39 S. C. 55, 17 S. E. 512; Lancaster Mills v. Merchants' etc. Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589; Brown v. Adams Exp. Co., 15 W. Va. 812; Schaller v. Chicago etc. Ry. Co., 97 Wis. 31, 71 N. W. 1042; Bancroft-Whitney Co. v. Queen of the Pacific, 75 Fed. 74. The nature of the injury may, however, itself indicate that it is covered by the specified exemption; as, for instance, where the carrier is exempted from liability for "breakage": The Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534.

b. As to Negligence of Carrier.

1. **In General—Conflict of Authority.**—The mere fact that the loss arose from a cause from liability for which the carrier is exempted by the provisions of the bill of lading will not avail him where his negligence has contributed to the injury. He cannot, by the great weight of authority, exempt himself by stipulation or otherwise from responsibility for the negligence of himself or his servants. Even when the loss is shown to be within the exceptions of the bill of lading, the carrier is nevertheless liable unless he has exercised all due diligence, and it becomes important to determine by whom the burden of proving this diligence or the lack of it must be borne. Upon this question the authorities are in stubborn conflict.

2. **Doctrine that Carrier must Show Lack of Negligence.**—According to one line of authorities, the carrier must do more than merely show that the loss arose from one of the excepted causes—he must further show that his negligence or default did not occasion it. This is the view of the courts of Alabama, Georgia, Minnesota, Mississippi, North Carolina, Ohio, South Carolina, Texas, and West Virginia. Under this doctrine the shipper makes out a prima facie case by showing delivery to the carrier, and that the goods were never delivered or that they were delivered in a damaged condition. The carrier can rebut this prima facie case only by showing that the loss occurred from one of the excepted causes, and that neither he nor his servants have by their negligence contributed thereto.

The arguments in favor of this rule are cogent. The first is that the facts are peculiarly within the knowledge of the carrier. The owner knows nothing of the circumstances surrounding the injury. From the moment the goods are delivered by him to the carrier they are in the exclusive possession of the latter. The servants of the carrier alone know where and how the injury occurred. Their names are in most cases unknown to the shipper. Even if they were known to him, it would be throwing a heavy burden upon him to compel him to prove by their testimony the negligence of their master and of themselves. "It is a salutary rule," says Willie, C. J., in Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589, "which presumes the existence of a fact against a party who has the means of disproving it in his power and fails to make use of them. And for this reason, it is safest to presume that a carrier is negligent who refuses to show to the contrary, when, if such is the fact, he has but to call his own agents to the witness-stand."

Nor is there any reason why an exception created by contract should stand on any different footing than one imposed by law. The fact that the common carrier carries under a special contract may change his responsibilities, but it does not change his character. He remains a common carrier. If he seeks to exempt himself from liability by showing that the loss arose from a peril for which he is not liable at common law, as an act of the public enemy, he must show that the loss was so caused, and further that his negligence did not contribute to bring about the accident. It is not apparent why the law should be otherwise where the exemption is contained in a bill of lading. The law incorporates into both the provision that the loss, even if arising from the excepted peril, must have been "unavoidable by the exercise of diligence." It is, therefore, according to this doctrine, not sufficient to exempt the carrier that he show that the loss was caused by a peril included in the exemptions of the bill of lading. He must further show that there was no lack of due diligence on the part of him-

self or his servants: Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; South and North Alabama R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; East Tennessee etc. Ry. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Berry v. Cooper, 28 Ga. 543; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Shriver v. Sioux City etc. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Southard v. Minneapolis etc. Ry. Co., 60 Minn. 382, 62 N. W. 442, 619; Shea v. Minneapolis etc. Ry. Co., 63 Minn. 228, 65 N. W. 458; Hinton v. Eastern Ry. Co., 72 Minn. 339, 75 N. W. 373; Johnson v. Alabama etc. Ry. Co., 69 Miss. 191, 30 Am. St. Rep. 534, 11 South. 104; Newberger Cotton Co. v. Illinois Cent. Ry. Co., 75 Miss. 303, 23 South. 186; Mitchell v. Carolina Cent. Ry. Co., 124 N. C. 236, 32 S. E. 671; Hinkle v. Southern Ry. Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Gaines v. Union Transp. etc. Co., 28 Ohio St. 418; Wallingford v. Columbia etc. Ry. Co., 26 S. C. 258, 2 S. E. 19; Johnstone v. Richmond etc. Ry. Co., 39 S. C. 55, 17 S. E. 512; Crawford v. Southern Ry. Co., 56 S. C. 136, 34 S. E. 80; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589; Texas etc. Ry. Co. v. Richmond (Tex.), 63 S. W. 619; Texas etc. Ry. Co. v. Payne (Tex. Civ. App.), 38 S. W. 366; Galveston etc. Ry. Co. v. Efrom (Tex. Civ. App.), 38 S. W. 639; Brown v. Adams Exp. Co., 15 W. Va. 812.

3. **Doctrine that Shipper must Show Negligence.**—The authorities are, however, in decided conflict upon this question, and the contrary view is held by the courts of Arkansas, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, New York, Pennsylvania, Tennessee, Wisconsin, and the federal courts. The arguments advanced for this doctrine are that having proved the loss to have accrued through one of the excepted perils, the carrier has prima facie relieved himself from responsibility, and that negligence is a positive wrong, not to be presumed, but to be proven by the party who alleges it. It is also said that under modern conditions much of the reason formerly existing for the strictness against common carriers has passed away, and accidents are usually open and notorious.

Under this view the carrier rebuts the prima facie case of the shipper by merely showing that the loss was occasioned by one of the excepted dangers. If, then, the shipper desires to charge the carrier, he must show that the negligence on the part of the latter directly contributed to such loss: Little Rock etc. Ry. Co. v. Talbot, 39 Ark. 523; Insurance Company of North America v. Lake Erie etc. Ry. Co., 152 Ind. 333, 53 N. E. 382; Indianapolis etc. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Reid v. Evansville etc. R. R. Co., 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; Parrill v. Cleveland etc. Ry. Co., 23 Ind. App. 638, 55 N. E. 1026; Mitchell v. United States Exp. Co., 46 Iowa, 214; Kallman v. United States Exp. Co., 3 Kan. 205; Kelham v. Steamship Kensington, 24 La. Ann. 100; Sager v. Portsmouth etc. R. R. Co., 31 Me. 228, 50

Am. Dec. 659; Bankard v. Baltimore etc. Ry. Co., 34 Md. 197, 6 Am. Rep. 321; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Read v. St. Louis etc. R. Co., 60 Mo. 199; Wittling v. St. Louis etc. Ry. Co., 101 Mo. 631, 20 Am. St. Rep. 636, 14 S. W. 743; Otis Co. v. Missouri Pac. Ry. Co., 112 Mo. 622, 20 S. W. 676; Standard Milling Co. v. White Line etc. Co., 122 Mo. 258, 26 S. W. 704; Lamb v. Camden etc. Transp. Co., 46 N. Y. 271, 7 Am. Rep. 327; Colton v. Cleveland etc. R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Lancaster Mills v. Merchants' etc. Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 817 (see, however, Dillard v. Louisville etc. Ry. Co., 70 Tenn. 288); Schaller v. Chicago etc. Ry. Co., 97 Wis. 31, 71 N. W. 1042; Clark v. Barnwell, 53 U. S. 272; The Montana, 17 Fed. 377; The Saratoga, 20 Fed. 869; The New Orleans, 26 Fed. 44; The Jefferson, 31 Fed. 489; Bancroft-Whitney Co. v. Queen of the Pacific, 75 Fed. 74; The Lennox, 90 Fed. 308.

4. Where Shipper Accompanies the Shipment.—In a number of cases a distinction is made between the rule as to burden of proof which should govern in the case of an ordinary shipment where the owner parts with all control over the goods, and the rule properly applicable to shipments of livestock where the shipper himself accompanies the stock. In the latter case it is said the animals are not in the exclusive custody and control of the carrier, so that the case is not within the reason usually given for the rule, that the carrier, and not the shipper, has the burden of proof as to negligence; i. e., that the former has ordinarily all the means of explanation and excuse at hand. It is therefore held that as to shipments which the owner accompanies, he has means of knowledge as to the cause of loss equal at least to that of the carrier, and should therefore be made to show that the breach or wrong which caused the injury was that of the carrier, and not his own: St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Terre Haute etc. R. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781; Parrill v. Cleveland etc. Ry. Co., 23 Ind. App. 638, 55 N. E. 1026; Grieve v. Illinois Cent. Ry. Co., 104 Iowa, 659, 74 N. W. 192; Clark v. St. Louis etc. Ry. Co., 64 Mo. 440; St. Louis etc. Ry. Co. v. Vaughn (Tex. Civ. App.), 41 S. W. 415.

It will be noted, however, that the cases upholding the distinction are nearly all in those states which hold that the shipper, even when he does not accompany the shipment, has the burden of proving that the carrier's negligence contributed to the injury, when once the carrier has shown that it was caused by an excepted peril. They are, therefore, but weak authority for the validity of the attempted distinction. In Crawford v. Southern Ry. Co., 56 S. C. 136, 34 S. E. 80, the argument advanced by these cases was urged. The court, however, held that the rule requiring the carrier to bring the loss within the exemption and to show himself free from fault was founded on other reasons than his superior opportunity

for knowledge of the cause of injury. The rule rests also "upon the ground that the contract for exemption from liability from injury resulting from certain specified causes does not affect the general character of the carrier, and only extends the grounds upon which he may claim exemption, beyond those which the common law alone recognizes—the act of God, or the public enemy; and in the absence of any special contract, the carrier must show that the injury resulted from one of these two causes, and the burden of proof is upon him to show this. Upon the same principle, where there is a special contract extending these causes of exemption, the burden of proof is on the carrier to show that the injury complained of resulted—not from his own negligence—but from one of the causes mentioned in the special contract": See, also, in this connection, Hull v. Chicago etc. Ry. Co., 41 Minn. 510, 16 Am. St. Rep. 722, 43 N. W. 391; Boehl v. Chicago etc. Ry. Co., 44 Minn. 191, 46 N. W. 333; Johnson v. Alabama etc. Ry. Co., 69 Miss. 191, 30 Am. St. Rep. 534, 11 South. 104.

VI. Conflict of Laws.

a. **General Rule.**—The rules as to conflict of laws generally applicable to other contracts control in the determination of questions of this nature with regard to the validity of limitations of the liability of a carrier in bills of lading. If the contract is made and to be wholly performed within one state, the law of that state will govern its validity even where it is brought into question in the courts of another state: Knowlton v. Erie Ry. Co., 19 Ohio St. 260, 2 Am. Rep. 395.

b. **Where Contract of Carriage is Made and Partly Performed in Foreign State.**—The same rule obtains where a contract for carriage is issued in one state to be performed in several states, among them the state in which the contract was entered into. In all such cases the law of the state where the contract was made and partly performed will govern, even if it was also partly performed in the state in which the validity of its terms is brought into question. "According to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country": Liverpool etc. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469. And to the same effect, see Western etc. R. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 91; Michigan Cent. Ry. Co. v. Boyd, 91 Ill. 268; Merchants' Disp. Transp. Co. v. Furthmann,

149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624, affirming 47 Ill. App. 561; McDaniel v. Chicago etc. Ry. Co., 24 Iowa, 412; Hazel v. Chicago etc. Ry. Co., 82 Iowa, 477, 48 N. W. 926; Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665; Ohio etc. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18; Tecumseh Mills v. Louisville etc. R. R. Co., 22 Ky. Law Rep. 264, 57 S. W. 9; Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. 87; Doan v. St. Louis etc. Co., 38 Mo. App. 408; Eckles v. Missouri Pac. Ry. Co., 72 Mo. App. 296; Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490; Pittsburgh etc. Ry. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; Forepaugh v. Delaware etc. R. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503; Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589; Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949; Davis v. Chicago etc. Ry. Co., 93 Wis. 470, 57 Am. St. Rep. 935, 67 N. W. 1132; Mather v. American Exp. Co., 2 Fed. 49; The Titania, 19 Fed. 101; Montagu v. The Henry B. Hyde, 82 Fed. 681.

c. **Proof of Assent to Terms of Bills of Lading.**—Whether assent to a stipulation in a bill of lading is to be presumed from acceptance of that instrument without dissent is, as we have seen (supra, pp. 80-100), a question upon which the courts are not in complete harmony, those of Illinois and Ohio holding that no assent can be implied from the mere receipt of a bill of lading. In Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106, a bill of lading, issued by a carrier in Illinois, contained a stipulation against loss by fire, and the question arose whether it had been assented to by the shipper. The court held that this was a question which affected the remedy only, and was therefore governed by the law of Massachusetts, the lex fori. The court says: "In the opinion of the court, the rule of law laid down in Illinois and here relied on by the plaintiff affects the remedy only, and ought not to control the courts of this commonwealth. The nature and validity of the special contract set up is the same in both states. It is only a difference in the mode of proof. A presumption of fact in one state is held legally sufficient to prove assent to the special contract relied on to support the defense. In the other state it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other." Following this case, the same view is taken in The Brantford City, 29 Fed. 373, and Schulze-Berge v. The Guildhall, 58 Fed. 796.

The validity of the holding in the Massachusetts case is, however, challenged in Hartman v. Louisville etc. Ry. Co., 39 Mo. App. 88, in the following language: "While the decisions of that state are entitled to great respect, we cannot assent to the soundness of this conclusion. The rule that matters pertaining to the remedy are governed by the forum always assumes that there is a con-

tract upon which a remedy is sought. It cannot be properly appealed to to determine the question of a contract or no contract. The question for decision in that case, as in the case before us, was whether a certain stipulation in an instrument of writing was a binding contract." The court then quotes from Wharton on Conflict of Laws, to the effect that a contract, so far as concerns its formal making, is to be determined by the law of the place where it is solemnized, unless the lex situs of the property disposed of otherwise requires; and continues as follows: "The rule must of necessity apply to such a contract as the case before us; otherwise we should be involved in the solecism of holding that a piece of paper containing a stipulation, of no validity in the place where it was executed and delivered, and where the general engagement evidenced by it was to be chiefly performed, becomes a contract in some other jurisdiction in which an action may chance to be brought upon it. The inconvenience of such a rule would be that a shipper in Illinois, accepting a bill of lading containing such a stipulation, must determine whether, by accepting it, he does not draw himself into a disadvantageous contract, not according to the law where the parties are when they make their contract, but according to the law of Missouri or Massachusetts, or some other foreign jurisdiction where the contract may possibly become the subject of an action."

d. **Doctrine of Federal Courts.**—In matters of commercial law the federal courts do not hold themselves bound by the decisions of the courts of the state where the particular question arose, but adopt as their basis of decision the "general commercial law." The existence of any such law has been doubted and declared to be "mythical," and the doctrine itself denounced as unsound in Forepaugh v. Delaware etc. Ry. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503, but it is undoubtedly the established rule in the federal courts. Matters connected with the limitation of a carrier's liability are held to be matters of "commercial law" within the meaning of the rule, and in dealing with questions of this nature the courts in question do so without regard to the law of any particular state: Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool etc. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469; Eells v. St. Louis etc. Ry. Co., 52 Fed. 903; Central of Georgia Ry. Co. v. Kavanaugh, 92 Fed. 56, 34 C. C. A. 203; Jennings v. Smith, 99 Fed. 189. This rule does not, however, apply when there is a statute of the state governing the matter. In such case the statute, as interpreted by the state court, will be applied by the federal courts: Central of Georgia Ry. Co. v. Kavanaugh, 92 Fed. 56, 34 C. C. A. 203; Chicago etc. Ry. Co. v. Solon, 169 U. S. 133, 18 Sup. Ct. Rep. 289. See, however, Jennings v. Smith, 99 Fed. 189.

e. Where Opposed to Public Policy of Lex Fori.

1. In General.—The enforcement of the laws of one state in the courts of another is a matter of comity. Comity cannot have this effect, however, when the contract which it is sought to enforce and which is permitted by the law of one state is regarded by the other as opposed to its settled public policy. Whether a contract exempting a carrier from liability for negligence, if valid in the place where made, will be enforced in a jurisdiction where such laws are void, is a question upon which the courts are not in accord.

In Forepaugh v. Delaware etc. Ry. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503, it was held that such a contract, valid in New York, would be enforced in Pennsylvania, although invalid by the law of that state: See, also, Knowlton v. Erie Ry. Co., 19 Ohio St. 260, 2 Am. Rep. 395. So limitations of liability valid in the place where made have been upheld in jurisdictions where a carrier was forbidden by statute to limit his liability at common law: Hazel v. Chicago etc. Ry. Co., 82 Iowa, 477, 48 N. W. 926; and even when such contracts are forbidden by the constitution of the latter state: Tecumseh Mills v. Louisville etc. Ry. Co., 22 Ky. Law Rep. 264, 57 S. W. 9. See, also, Western etc. Ry. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916.

The doctrine of Forepaugh v. Delaware etc. Ry. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503, is held inapplicable in the very recent case of Hughes v. Pennsylvania Ry. Co. (Pa.), 51 Atl. 990, to a case where the breach of the contract occurs within the state where it is sought to be enforced and by whose laws it is invalid. And in Nebraska, where railroad companies are prohibited by the state constitution from limiting their liability as common carriers, it is held that no such limitation will be enforced by the courts of that state, no matter what the lex loci contractus may be. "The power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is, therefore, a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois is to ask that the courts of this state shall sanction what by the constitution has been declared illegal and against the public policy of this commonwealth. To this we can never assent": Chicago etc. R. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508. And to the same effect, see The Brantford City, 29 Fed. 373; Schulze-Berge v. The Guildhall, 58 Fed. 796.

2. Stipulation that Foreign Law shall Govern.—By the law of England ship owners may (see supra, p. 100), by stipulation in a bill of lading, exempt themselves from liability for negligence, while by the law of this country generally they may not. In attempting to so limit their liability, it is frequently provided in bills of lading which would otherwise be controlled by the law of

this country that they shall be governed as to their validity by the law of England. Such stipulations are uniformly held invalid, as mere attempts on the part of the carrier to evade the policy of the law and to limit his liability for negligence. Stipulations held void by the policy of the law are not to be validated by stipulation of the parties, nor can a party accomplish indirectly by such a device what the law does not permit him to do directly: The Hugo, 57 Fed. 403; Phillips v. The Energia, 56 Fed. 124; Lewisohn v. National Steamship Co., 56 Fed. 602; Washburn v. Cincinnati etc. Ry. Co., 40 Fed. 731; The Brantford City, 29 Fed. 373; Schulze-Berge v. The Guildhall, 58 Fed. 796. See, also, Compagnie de Navigacion etc. v. Brauer, 168 U. S. 104, 18 Sup. Ct. Rep. 12.

VII. Statutory Regulation of.

a. Prohibiting Limitations of Liability.

1. In General.—Up to this point the subject of limitation of liability on the part of a carrier has been considered with reference to such contracts where unaffected by statutory enactment. In many of the states, however, the right of a carrier to qualify his common-law liability has been made the subject of legislation, the tendency in all being to restrict rather than to enlarge his right so to contract.

In a few states this has been carried to the extent of prohibiting a common carrier from in any way limiting his liability as it exists at common law. Such prohibitions are to be found in the constitutions of Kentucky and Nebraska and by statute in Iowa and Texas.

The provision of the Nebraska constitution is that "the liability of railroad corporations as common carriers shall never be limited." In Missouri Pac. Ry. Co. v. Vandeventer, 26 Neb. 222, 41 N. W. 998, it was contended that this prohibition was intended to prevent limitations of the carrier's liability by the legislature, and was not applicable to contracts between the carrier and his employer by which the liability of the former was qualified. The court held, however, that the provision was intended "to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreements with shippers, and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefor." Some doubt has been cast upon the correctness of this interpretation (St. Joseph etc. Ry. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957, per Irvine, C.), but it is the undoubted law of Nebraska that any contract limiting the common-law liability of a carrier is forbidden by the constitution and void: Chicago etc. Ry. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508; St. Joseph etc. Ry. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957. The provisions of this nature in the other states avoid all ambiguity by expressly

prohibiting and invalidating all contracts or agreements by which a common carrier seeks to exempt himself from the responsibilities laid upon him by the common law: See, in this connection, McDaniel v. Chicago etc. Ry. Co., 24 Iowa, 412; McCoy v. K. & D. M. Ry. Co., 44 Iowa, 424; Grieve v. Illinois Cent. Ry. Co., 104 Iowa, 659, 74 N. W. 192; Ohio etc. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18; Illinois Cent. Ry. Co. v. Radford (Ky.), 64 S. W. 511; Gulf etc. Ry. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; Gulf etc. Ry. Co. v. Boaton (Tex. App.), 15 S. W. 909; Texas etc. Ry. Co. v. Stribting (Tex. App.), 34 S. W. 1002. In Kansas such limitations of liability are by statute prohibited except where otherwise provided by the state board of railroad commissioners: Burgher v. Chicago etc. Ry. Co., 105 Iowa, 335, 75 N. W. 192; St. Louis etc. Ry. Co. v. Sherlock, 59 Kan. 23, 51 Pac. 899.

2. **Applicability to Interstate Shipments.**—In general no distinction is made by these statutes between domestic and interstate shipments, and they are construed as equally applicable to both: McDaniel v. Chicago etc. Ry. Co., 24 Iowa, 412; Ohio etc. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18; St. Joseph etc. Ry. Co. v. Palmer, 38 Neb. 463, 56 S. W. 957. The Texas statute is, however, peculiar, in that it refers only to "railroad companies and other common carriers within this state," and as was held in Missouri Pac. Ry. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, is applicable only to domestic shipments. And to the same effect, see Missouri Pac. Ry. Co. v. International etc. Ins. Co., 84 Tex. 149, 19 S. W. 459; Houston etc. Nav. Co. v. Insurance Company of North America, 89 Tex. 1, 59 Am. St. Rep. 17, 32 S. W. 889; Southern Pac. Co. v. Phillipson (Tex. App.), 39 S. W. 958. As to the validity of such statutes under the federal constitution when they apply to interstate shipments, see post, p. 133.

b. **Prohibiting Limitations of Liability in "Receipts."**—The statutes just considered go to the extreme of prohibition in restricting the right of a common carrier to limit his liability. A far more frequent class of provisions is that in which the assent of the shipper to stipulations of this nature is required to be evidenced by something more than the acquiescent receipt of a bill of lading containing them.

In Illinois, for instance, a carrier may not limit his common-law liability "by any stipulation or limitation expressed in the receipt given for such property." This statute, it is said in Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417, was intended to avoid the frequent questions formerly arising as to whether the shipper had knowingly assented to the restriction of the carrier's liability when contained in a mere receipt. This difficulty has not, however, been obviated by the statute, since it is held that a bill of lading is not necessarily a mere "receipt" within the meaning of the statute, but is both a receipt and

a contract. A carrier may, therefore, even under this statute, stipulate for exemption from liability in a bill of lading, and the question whether the shipper assented to such stipulations remains, as before, a question of fact: Chicago etc. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596, and cases there cited. Where the contract is signed by the shipper, he will be conclusively deemed to have assented: Jennings v. Smith, 99 Fed. 189.

c. **Requiring "Express Contract."**—In Georgia, it is provided by statute that "a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given, or tickets sold. He may make an express contract and will then be governed thereby." Exactly what constitutes an "express contract" within the meaning of this provision is by no means clear. In a number of cases, especially the earlier ones, it is said that the contract, in order to be "express" must be outside the receipt given for the goods, and "must be made independently of the receipt given for the goods, and be proved independently thereof": Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Exp. Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53; Mosher v. Southern Exp. Co., 38 Ga. 37. It has, however, been held that an "express contract" within the statute may be on a receipt, if both parties have a fair opportunity to examine its terms, and the language of the earlier cases to the effect that such contract must be "outside the receipt given for the goods" is said to mean no more than that a carrier cannot by any act of his own, to which the other party does not consent, limit his liability: Wallace v. Matthews, 39 Ga. 617, 79 Am. Dec. 473. "But if the parties make a special contract to that effect, it will not be set aside because it may have been inserted in the receipt—the question in such cases being, was there an express contract and not where it was put": Georgia Ry. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81. Mere acceptance without dissent of a bill of lading containing restrictions upon the liability of the common carrier is not, it is held, an express contract such as the statute requires: Central Ry. Co. v. Dwight Mfg. Co., 75 Ga. 609; Central R. R. etc. Co. v. Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; Georgia Ry. Co. v. Gann, 68 Ga. 350; Central etc. Ry. Co. v. Kavanaugh, 92 Fed. 56, 34 C. C. A. 208.

d. **Requiring Signatures of Parties.**—In a number of jurisdictions it is required by statute that contracts limiting the liability of carriers be signed by the parties. Thus, in the railway and canal traffic act (17 & 18 Vict., c. 31), it is provided that no special contract between the carriers affected by the act "and any other party shall be binding upon or affect such party, unless the same be signed by him" or by his agent. It is held, however, that the contract will be binding on the carrier under this statute, even though it is not signed by the shipper: Baxendale v. Great Eastern

Ry. Co., L. R. 4 Q. B. 244. Other statutes require that such agreements, to be valid, shall be signed by both parties: Feige v. Michigan Cent. Ry. Co., 62 Mich. 1, 28 N. W. 685. See, also, in this connection, Hartwell v. Northern Pac. Exp. Co., 5 Dak. 463, 41 N. W. 732; Hazel v. Chicago etc. Ry. Co., 82 Iowa, 477, 48 N. W. 926; Richmond etc. Ry. Co. v. Patterson Tobacco Co., 92 Va. 670, 24 S. E. 261; affirmed, 169 U. S. 311, 18 Sup. Ct. Rep. 335.

e. As Affecting Particular Stipulations.

1. Limitation of Liability for Losses on Connecting Lines.—A common carrier is not at common law bound to accept articles for transportation to a destination beyond the terminus of his own line, and if he does so may do it upon such terms as are agreed upon. His liability is, in such a case, imposed not by the common law, but by a contract. He may therefore limit his liability to his own line even under a constitutional provision forbidding and invalidating all limitations by common carriers of their liability: Ireland v. Mobile etc. Ry. Co. (Ky.), 49 S. W. 188, 453; Miller Grain etc. Co. v. Union Pac. Ry. Co., 138 Mo. 658, 40 S. W. 894. See, also, The City of Clarksville, 94 Fed. 201.

In at least two states, however (Missouri and Nebraska), the right of a carrier to limit his liability to his own line, where the contract is one for through carriage to a point on a connecting line, is denied by statute. Such statutes are held not to impose upon the carrier the obligation to carry beyond the terminus of his line, where there is no agreement so to do. The carrier may still agree to accept goods for transportation only on its own road: McCann v. Eddy, 133 Mo. 62, 33 S. W. 71; Miller Grain etc. Co. v. Union Pac. Ry. Co., 138 Mo. 658, 40 S. W. 894 (with reference to statute of Nebraska). If, however, he enters into a contract for through carriage to a point on the line of a connecting carrier, he cannot, under these statutes, at the same time exempt himself from all liability for the acts of the connecting carrier who completes the transportation: McCann v. Eddy, 133 Mo. 62, 33 S. W. 71; Miller Grain etc. Co. v. Union Pac. Ry. Co., 138 Mo. 658, 40 S. W. 894; Dimmitt v. Kansas City etc. Ry. Co., 103 Mo. 440, 15 S. W. 761; State Nat. Bank v. Chicago etc. Ry. Co., 72 Mo. App. 82; Marshall v. Kansas City etc. Ry. Co., 74 Mo. App. 81; Popham v. Barnard, 77 Mo. App. 619, and cases there cited.

2. Limiting Amount of Recovery.—Where a statute prohibits a common carrier from limiting his liability, he may not, it is held, stipulate that in case of loss the amount recoverable shall be the value of the article at the time and place of shipment, or indeed, an amount less than the actual damage: Hart v. Chicago etc. Ry. Co., 69 Iowa, 485, 29 N. W. 597; International etc. Ry. Co. v. Parish, 18 Tex. Civ. App. 130, 43 S. W. 1066; Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949. In Mather v. American Exp. Co., 2 Fed. 49, it was held, however, that a

statute of Illinois, prohibiting such limitations of liability in the receipt given for the property shipped was not intended to prevent a carrier from limiting his liability to a fixed sum, where the shipper refused to inform the latter of the value of the property.

3. **Stipulation for Notice of Claim for Loss or Damage.**—A provision for notice of claim of loss has been held to be a "limitation of liability" within the meaning of the Kentucky constitution prohibiting a carrier from limiting his liability at common law: Ohio etc. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18; Brown v. Illinois Cent. Ry. Co., 100 Ky. 525, 38 S. W. 862; Illinois Cent. Ry. Co. v. Radford (Ky.), 64 S. W. 511.

By statute in Texas no stipulation which requires notice of claim of loss to be given within less than ninety days as a condition precedent to the right of the shipper to sue is valid. This statute is construed as applicable alike to interstate and domestic shipments: Gulf etc. Ry. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Armstrong v. Galveston etc. Ry. Co., 92 Tex. 117, 46 S. W. 33; and the period prescribed by it is regarded as a legislative determination of what shall be regarded as a reasonable length of time: Gulf etc. Ry. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Gulf etc. Ry. Co. v. Yates (Tex. App.), 32 S. W. 355.

4. **Limiting Time within Which Suit may be Brought.**—By statute in Missouri, any contract which limits the time within which action may be brought is, to that extent, null and void. A carrier cannot, therefore, under this provision, by stipulation in a bill of lading or elsewhere, require that action be brought for a breach within sixty days after the injury: Richardson v. Chicago etc. Ry. Co., 149 Mo. 311, 50 S. W. 782. In Texas no limitation of the right to sue to a period less than two years is enforceable. Such provision applies to both interstate and domestic shipments: Gulf etc. Ry. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Armstrong v. Galveston etc. Ry. Co., 92 Tex. 117, 46 S. W. 33. See, also, Texas etc. Ry. Co. v. Reeves, 90 Tex. 499, 59 Am. St. Rep. 830, 39 S. W. 564.

f. **Constitutionality of.**—Statutes affecting the right of a common carrier to limit his common-law liability have, when applied to interstate shipments, been frequently attacked as amounting to an unconstitutional interference by the state with interstate commerce. They have, however, been uniformly upheld. A provision of this kind is, it is held, "in just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods": Chicago etc. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. Rep. 289, affirming Solan v. Chicago etc. Ry. Co., 95 Iowa, 260, 58 Am. St.

Rep. 430, 63 N. W. 692. See to the same effect, Hart v. Chicago etc. Ry. Co., 69 Iowa, 485, 29 N. W. 597; Ohio etc. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18; McCann v. Eddy, 133 Mo. 62, 33 S. W. 71; Armstrong v. Galveston etc. Ry. Co., 92 Tex. 117, 46 S. W. 33; Gulf etc. Ry. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Richmond etc. R. Co. v. Patterson Tobacco Co., 92 Va. 670, 24 S. E. 261; affirmed, 169 U. S. 311, 18 Sup. Ct. Rep. 335. See, also, Davis v. Chicago etc. Ry. Co., 93 Wis. 470, 57 Am. St. Rep. 935, 67 N. W. 16, 1132.

MATZENBAUGH v. PEOPLE.

[194 Ill. 108, 62 N. E. 546.]

DOMICILE—CHANGE OF—DECLARATIONS.—Whether going from one state to another effects a change of domicile is largely a matter of intent, and any declarations so connected with the act of going as to be regarded as qualifying or characterizing the act are admissible in evidence as tending to establish the intent actuating the party at the time. (p. 137.)

EVIDENCE.—RECORD OF CONVICTION of a statutory offense, punishable by fine and imprisonment only in the county jail, is not admissible in evidence for the purpose of discrediting the witness so convicted. (p. 137.)

EVIDENCE—DECLARATIONS OF AGENT AS EVIDENCE. Declarations of an agent within the scope of his authority, and relating to a transaction then being performed by him as agent, are competent evidence against his principal. (p. 140.)

TAXATION—SITUS OF CREDITS.—An exception to the rule that the taxable situs of credits is at the domicile of the owner exists when the evidence of such indebtedness is in the hands of an agent of the owner, for the purpose of enabling the agent to transact the business of the owner, in which business the credits constitute the subject matter or stock in trade. (pp. 140, 141.)

TAXATION—SITUS OF PERSONALTY.—Notes and securities of a principal remaining in the hands of his agent in one state, to enable the latter to successfully carry on the business of the principal, are taxable in that state, although he may have established his domicile in another state. (p. 141.)

TAXATION.—PERSONAL TAXES ARE PROPERLY CHARGED AGAINST REAL ESTATE when the taxpayer has removed from the state, and the tax collector is unable to find personalty out of which such taxes may be made. (p. 142.)

Doyle & Crangle, for the appellant.

A. F. Goodyear and J. W. Kern, for the appellee.

109 BOGGS, J. The appellant was summoned to appear before the board of review of Iroquois county, at its session in the year 1900, to answer why he should not make a report of

personal property for assessment for that year. He appeared and pleaded that prior to the first day of April, 1900, he removed from the state of Illinois to the state of Texas, and at the same time removed his personal property (except twenty thousand dollars in government bonds, about fifteen head of cattle, a horse and an old buggy), to the said state of Texas. The board of review decided he had notes and evidences of indebtedness liable to assessment in Iroquois county. He declined to make a statement of such credits for assessment, and the board, after taking into consideration the amount of his assessable credits for the previous year and items in reduction and addition thereto, arrived at an amount which, in the opinion of the board, he should have reported for assessment, and to this sum added a penalty of fifty per cent thereon and ordered an assessment against him to be made accordingly. The assessment was entered on the tax collector's book and the sum of two thousand two hundred and eighteen dollars and fifty-one cents extended as taxes thereon for the year 1900, and being unpaid and delinquent, the [110] treasurer and ex-officio collector of the county determined to charge the same against real estate belonging to the appellant, and selected the northeast quarter of section 3, township 27 north, range 12 west of the second principal meridian, in said county —a tract owned by the appellant—for that purpose, and took the steps required by the statute to render said tract of land liable to judgment and order of sale to pay the said personal property tax. To the application of the said county collector for such judgment and order of sale the appellant filed the following objections: "On April 1, 1900, all the notes, mortgages, moneys, and personal property owned and possessed by this objector (except cattle in this county, upon which he has paid the taxes) were in the state of Texas, where they have ever since remained, and were not on said April 1, 1900, in the state of Illinois, and at the last-mentioned day this objector had no notes, moneys, or other personal property in Iroquois county and state of Illinois that he has not already paid the taxes thereon; that said county collector was not authorized to charge said two thousand two hundred and eighteen dollars and fifty-one cents against said northeast quarter because no effort was made to collect said sum prior to charging the same against said northeast quarter. The county court, on a hearing, overruled the objections of appellant and awarded judgment as asked by the appellee col-

lector of the county. Objector has prosecuted this appeal to review the judgment.

The defense sought to be interposed was, that the appellant, who had been a resident of the county of Iroquois, in the state of Illinois, for a period of about thirty years, on the twentieth day of March, 1900, removed from the state of Illinois and became a resident of the state of Texas, and that he took with him to his domicile in Texas the notes and other evidences of indebtedness assessed by the board of review for taxation, and that on the first day of April, 1900, his place of residence and the actual situs of the notes and evidences of indebtedness were in [111] the state of Texas. The treasurer and ex-officio collector contended: 1. That the domicile of the appellant was not changed from the state of Illinois, and that the alleged removal to Texas was but colorable and not real, and but a pretense to enable the appellant to avoid payment of the taxes on notes and other evidences of indebtedness of which the appellant was the owner; and 2. That the notes and other evidences of indebtedness were not removed from the state of Illinois, but were left in the charge of a Mrs. Fisher, a daughter of the appellant, in Watseka, in said Iroquois county; that Mrs. Fisher was the agent of the appellant, and as such agent had the actual possession of said notes and evidences of indebtedness and received payment of interest or principal as such agent, and had the notes, etc., in her possession to enable her to transact such affairs of business for the appellant.

The appellant, it is conceded, had resided in Iroquois county for nearly thirty years. He testified, however, that he did not reside there on the first day of April, 1900, but about ten days before that date went to the state of Texas with the intention of making his permanent home in that state. Many circumstances were proven which tended very strongly to support the view that the alleged change of his domicile was but a pretense to enable him to escape his fair burden of taxation. But we cannot affirm the judgment on this ground, for the reason the court rejected competent testimony offered by appellant bearing on the point, and admitted incompetent matter in evidence bearing on the credibility of the appellant as a witness on his own behalf. The appellant sought, but the court refused to allow him, to prove his own declarations as to his intentions in going to Texas—that his intent was to become a permanent resident of that state. Some of the

declarations sought to be proven were incompetent because too remote, in point of time of utterance, from the act of leaving Illinois and going [112] to Texas, but others of the declarations offered to be proven were of the res gestae of the removal. Whether going from one state to another would effect a change of domicile is largely a matter of intent. The declarations of the party are at times admissible to show the intent in making the journey. The rule is thus stated by Mr. Greenleaf in his work on Evidence (volume 1, section 108): If one "changes his actual residence or domicile, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts, indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts. So upon inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his declarations and conversation are admissible. They are parts of the res gestae." Any declarations of appellant which were so connected with the act of going from Illinois to Texas that they should have been regarded as qualifying or characterizing the act were admissible in evidence as tending to establish the intent which actuated the appellant at the time. The court erred in refusing to permit such declarations to be given in evidence.

The court also erred in permitting the appellee to produce in evidence the record of the conviction of the appellant for making and delivering to the assessor, in the year 1899, a false and fraudulent schedule of his property for taxation, with intent to defeat the law in relation to the assessment of property for taxation. It was offered for the purpose of serving to discredit the testimony of the appellant, and was thought by the court to be admissible for that purpose. It is true, section 1 of chapter 51 of the Revised Statutes, entitled "Evidence," etc., provides that no person shall be disqualified to give testimony as a witness because of his conviction of any [113] crime, but that such conviction may be given in evidence for the purpose of affecting the credibility of the witness. The proper construction of this section of the statute is, that the rule of the common law that a person who has been convicted of a crime which rendered him infamous should be denied the right to give testimony is abolished, but that the

conviction of the crime may be given in evidence for the purpose of discrediting the testimony given by such a person as a witness. The offense of which the appellant was convicted is not of the character or grade of crime deemed infamous at the common law or under our statutes. It is a statutory offense, punishable by fine and imprisonment in the county jail: Hurd's Stats. 1899, c. 120, par. 339. Nor is it of the class of offenses denominated "crimen falsi," which were deemed infamous at common law. Crimen falsi, according to the better opinion, does not include all offenses which involve a charge of untruthfulness, but only such as injuriously affect the administration of public justice, such as perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, or to accuse one wrongfully of a crime, or barratry, or the like: 1 Greenleaf on Evidence, sec. 373; 16 Am. & Eng. Ency. of Law, 2d ed., 246, 247. The enactment of said section 1 of our statute on evidence has no effect to authorize the introduction of proof of the conviction of the witness of an offense that would not have rendered him incompetent to testify in the absence of the statute: Bartholomew v. People, 104 Ill. 601, 44 Am. Rep. 97.

The evidence relied upon to defeat the contention of the appellant that he had actually changed his domicile, and on the first day of April, 1900, was a citizen of the state of Texas, though strong, is not sufficient to justify us in saying it should prevail in the face of these erroneous rulings.

But upon the other branch of the case we think the evidence warranted the judgment. Even if appellant became, [114] in good faith, a resident of the state of Texas on the first day of April, 1900, the evidence sufficiently demonstrated that the notes and evidences of indebtedness assessed for taxation were not removed from this state, but remained in the hands of his daughter, Mrs. Fisher, as his agent, at her home in Watseka, Illinois, to uphold the judgment of the county court. The appellant testified he took his notes, securities, etc., with him to Texas in two "satchels," neither of which was locked, but merely fastened with straps; that he did not "check" either of them as baggage. He would not state the amount of the securities or even venture an estimate, further than to say he did not believe the aggregate thereof amounted to one hundred and fifty thousand dollars, and testified that on arriving at his destination in the state

of Texas he put the notes and securities in the vault of the First National Bank of Beeville, Texas, and has kept them there ever since, except when he sent some of the notes to his daughter (Mrs. Fisher), in Watseka, Illinois, for payment. Mr. Reeder, who accompanied the appellant on his trip to Texas and who was produced as a witness in behalf of the appellant, on cross-examination testified that the appellant had two valises on the journey, but denied the statement of the appellant that he (the appellant) kept the valises in his own care and possession on the journey. Mr. Reeder testified one of the valises (the smaller one) contained brushes, combs, etc., night clothing and other wearing apparel, and that the appellant carried it, but that he checked the other, the larger of the valises; that the larger grip, which was checked, got misplaced and occasioned some trouble and bother in tracing and recovering it. It is indisputable that appellant owned notes secured by mortgages, and other credits, in the aggregate amount of not less than one hundred thousand dollars—probably one hundred and fifty thousand dollars; and the contradiction by Mr. Reeder of appellant's statement as to the manner in which these evidences of his indebtedness were taken to Texas, and the very great improbability [115] that the valise which appellant "checked," and which was only fastened by a strap, contained credits of such great value could but have influenced the court to discredit the statement of appellant that he took these credits with him to Texas.

That the notes and other securities were not removed to Texas, but remained in Illinois, seemed well established by other proof. The appellant testified he returned to Watseka, Illinois, in May, 1900, after going to Texas in March of the same year, and that he brought the two valises back with him, but that he brought none of the notes or securities back with him. Decatur Morgan, a witness for the appellee collector, testified that soon after appellant came back from Texas he paid him the amount he was indebted to appellant on a note, and that appellant on the same day delivered him the note. John Gillan testified that, acting for a Mr. Eagle, he paid to Mrs. Fisher (appellant's daughter) a past due interest coupon note, being the interest on a principal note which Mr. Eagle owed to the appellant; that he did not think Mr. Eagle ought to be charged with interest on the coupon note after its maturity, because the appellant, to whom it was due, was away from Illinois and Eagle could not find him to make

the payment when it was due, but Mrs. Fisher required the interest on the coupon to be paid, and said to him: "Well, if he [Eagle] had gone to the First National Bank [Watseka] they could have told him that she attended to those matters when he [Matzenbaugh] was gone, and to go to her, and that he would have to pay from the first of November down, on the interest." It was not objected that this statement of Mrs. Fisher was but hearsay testimony, and incompetent. It was well established that Mrs. Fisher was the agent of the appellant. She was then performing an act as agent and within the scope of her power in that capacity, and the declarations were in relation to the transaction then being performed by her as agent. Her declarations were [116] competent to be received in evidence against the appellant: 1 Am. & Eng. Ency. of Law, 2d ed., 693, 694. Mr. Gillan then testified he paid the coupon note and the interest thereon to Mrs. Fisher, and that she delivered the coupon note to him to be delivered to Mr. Eagle. Mr. Anderson testified that he and his brother owed appellant several notes, aggregating about fourteen thousand dollars; that he desired to see the notes during the time appellant was absent in Texas; that he called on Mrs. Fisher and made known his wants, and that she had all the notes, produced them and allowed him to inspect them. Mr. McGill, president of the First National Bank of Watseka, testified that during appellant's absence in Texas parties would make inquiry at the bank about their notes to appellant, and that they were always referred to Mrs. Fisher; that such parties, at times, after being so advised, would draw checks on witness' bank and go away and return with their notes and mortgages which they had paid off. It was also proven that during the appellant's absence in Texas a number of loans were made of his funds through Mrs. Fisher, as his agent; that she made collections for him and made remittances, and paid the taxes on a number of farms owned by him in Iroquois county. She was his agent, and the court was amply justified in believing she had his notes and securities in her possession in Watseka, Illinois, for the purpose of enabling her to transact the business of collecting and loaning money in Iroquois county for him.

The general rule is, the taxable situs of credits is the domicile of the owner. But an exception to the rule arises when the instruments which evidence the right of the owner to receive the indebtedness which constitutes the "credits" are

in the hands of an agent of the owner for the purpose of enabling such agent to transact the business of the owner, in which business the credits constitute, as it were, the subject matter or stock in trade of such business: Hayward v. Board of Review, 189 Ill. 234, 59 N. E. 601; [117] Goldgart v. People, 106 Ill. 25. Section 1 of chapter 120 of the Revised Statutes, entitled "Revenue," declares, in a general way, what property shall be liable to assessment for taxation. Clause 2 of the section is as follows: "All moneys, credits, bonds, or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu to or from this state, used, held, owned, or controlled by persons residing in this state." Section 9 of the act reads as follows: "The property of manufacturers and others, in the hands of agents, shall be listed and assessed at the place where the business of such agent is carried on."

Regardless of the insistence of appellant that he had in good faith changed his domicile from Illinois to Texas, the situs of his notes and securities, which remained in the hands of his agent in Illinois, for the purpose of enabling such agent to successfully and conveniently continue the prosecution of the business of loaning money, in which appellant had long been engaged, was not changed, but such notes and securities were subject to taxation under the operation of the laws of the state of Illinois. The distinction between this and the case of Hayward v. Board of Review, 189 Ill. 234, 59 N. E. 601, is that in the latter case the domicile of the owner was in Indiana and the proof did not show that the situs of the credits was in Illinois.

It is contended that it appeared the appellant owned some cattle in Iroquois county, and had money in one or more of the banks in that county, and that the taxes on these credits could have been made by proper efforts on the part of the collector of taxes, without resorting to the real estate of appellant. Section 255 of the revenue act (Rev. Stats., 899) provides that the taxes on personal property shall not be charged against real estate "except in cases of removals, or where the said tax cannot be made out of the personal property." It seems some cattle in the possession of a tenant on one of a number [118] of farms owned by the appellant in Iroquois county belonged to appellant, but nothing appeared to indicate to the officials but that the cattle belonged to the

person who had them in possession. The evidence of the collector was, in substance, that he did not know, and that he made inquiry but could not learn, of any property belonging to appellant which could be seized and sold to pay the taxes on these credits. The proviso to said section 255 of the revenue act, so far as it relates to the matter in hand, is as follows: "Provided, that judgment against real property, for nonpayment of taxes thereon, shall not be prevented by showing that the owner thereof was possessed of personal property subject to distraint."

The case of Mt. Carmel Light etc. Co. v. People, 166 Ill. 199, 46 N. E. 722, which is relied on by appellant to support his contention that the failure of the collector to levy upon or distrain the personalty defeats any attempt to collect the taxes by a sale of realty, was submitted upon a stipulation to the effect that the tax there sought to be collected by sale of the land was levied on personalty which was still in the possession of the party to whom it was assessed, and could have been seized at any time by the collector, but that he made no effort to collect the personal property tax beyond demanding payment thereof. We held, under such state of the case, the collector was not authorized to charge the personal tax against the real estate. The decision, in substance, is that the collector cannot, under our statute, as a matter of mere choice or preference on his part, elect to charge the personal taxes against the real estate. In the case at bar the ex-officio collector made an effort, in good faith, to collect the personal taxes from personalty. No intervening right of others in the land exists, and the collector did not err in charging the personal taxes against the land.

The judgment of the county court is affirmed.

Taxation—Situs of Personalty.—Personal property is usually taxable where the owner resides, but its situs, for the purposes of taxation, does not always or necessarily follow his domicile: Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; Hall v. American Refrigerator etc. Co., 24 Colo. 291, 65 Am. St. Rep. 223, 51 Pac. 421. The situs of a debt for purposes of taxation is, as a rule, at the domicile of the creditor: Liverpool etc. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 72 Am. St. Rep. 483, 25 South. 970; Balk v. Harris, 124 N. C. 467, 70 Am. St. Rep. 606, 32 S. E. 799. But credits and moneys used in business in this state, either by the owner or his agent, are taxable here, though the owner resides elsewhere: Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8. See the note to People v. Worthington, 74 Am. Dec. 93-96, on the taxation of credits. And for a full discussion of the situs of all forms of personal property for the purpose of taxa-

tion, consult the monographic note to Buck v. Miller, 62 Am. St. Rep. 448-477.

Change of Domicile.—Whether a man has changed his residence from one state to another depends largely upon his intention: See the monographic note to Berry v. Wilcox, 48 Am. St. Rep. 715. The declarations of a person accompanying a change of his abiding place are often admissible as tending to show his intention: Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901; Kreitz v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232.

The Impeachment of Witnesses by proof of conviction of crime is considered in the monographic note to Lodge v. State, 82 Am. St. Rep. 34-39.

GIVINS v. PEOPLE.

[194 Ill. 150, 62 N. E. 534.]

PUBLIC WORK—REJECTION OF BID.—A bid for a public contract under a special assessment ordinance, though it be that of the lowest responsible bidder, may be rejected if it results from a combination among the bidders, or from the act of the successful bidder in stifling competition to increase the contract price. (p. 146.)

ASSESSMENTS, SPECIAL—ESTOPPEL AGAINST PROPERTY OWNER.—A property owner cannot stand by knowing of facts justifying the repudiation of a contract for a special assessment improvement, until he has secured the benefit of the work and materials of the contractor, and then ask to be relieved of all liability to pay therefor. (p. 146.)

Mason & Noyes, for the appellant.

C. M. Walker, corporation counsel, E. B. Tolman, R. Redfield, and W. M. Pindell, for the appellee.

151 BOGGS, J. This is an appeal from a judgment and order of sale of certain lots belonging to the appellant, entered on the application of the appellee, treasurer and ex-officio collector of Cook county, for such judgment and order of sale for nonpayment of the first installment of a special assessment levied under an ordinance of the city of Chicago providing for the improvement of Longworth avenue, from West Ninety-fifth street to West One Hundred and Seventh street, by curbing, grading, and macadamizing the same.

The contract for the construction of the improvement ordered by the ordinance to be made, which was entered into by and between the said city, acting through the board of local improvements, and the Illinois Improvement and Ballast Company, the lowest bidder for such contract at the public letting thereof, contained a specification to the effect that the said

improvement and ballast company should not employ, or permit to be employed by its subcontractors, any person or persons other than natural born or naturalized citizens of the United States. This specification was made the basis of an objection in the county court to the rendition of a judgment against the property of the appellant. The specification does not appear in the ordinance providing for the making of the improvement of the street or in any general or special ordinance of the city; nor was it shown that there was any such requirement in the advertisement for bids for letting the work; or that the said clause was known to bidders or in any way affected the bidding, or that any of the bidders knew, before bidding, that the "alien labor" clause, as such clause or specification is popularly known, [152] would be required to be inserted in the contract; or that the work was bid for by anyone on the basis that "alien labor" could not be employed; or that said clause or specification was anything else than a voluntary arrangement between the city and the successful bidder after the contract had been awarded as the result of open competition; or that said clause in any way affected either the amount of the bid or the cost of the work, or in any manner operated to the prejudice of the objector or of any property owner who properly has been assessed for the cost of said improvement. The state of the record in respect of this objection is the same as the record in the case of Hamilton v. People, 194 Ill. 133, 62 N. E. 533. We there held that the insertion of the clause known as the "alien labor" clause, in the contract alone, had no effect to prejudice the property holder, and presented no valid reason for refusing judgment as asked by the collector. On the authority of the decision in that case we must hold that this objection was properly overruled in this case.

Under other objections filed by the appellant to the rendition of judgment against his property, the appellant, not being ready to produce his proof in court at the time of the hearing, adopted the course of stating to the court the state of facts he contended he could prove, and having the court pass upon the sufficiency of such state of facts as a defense to the application of the collector. The following facts were those stated by counsel: "That the Illinois Improvement and Ballast Company was declared the successful bidder at the public letting of the contract to construct the proposed improvement, and that the said Illinois Improvement and Ballast Com-

pany has long prior to the bidding in this case, and now does, control all the blast and furnace slag in this market; that such slag comes from the Illinois Steel Company's works at South Chicago, and that said improvement company controls and dictates the price of such material, and did so dictate and control the price of said material at the [153] time of the bidding and the letting of the contract herein, and that said contractor has refused to sell other contractors in this market unless such contractors would agree not to oppose the use of slag on the streets of the city of Chicago; that upon that condition alone it has been possible for other contractors to bid in slag paving cases, and that said Illinois Improvement and Ballast Company was the only bidder on this improvement; that said improvement company has given the trade, to wit, the pavement contractors and street building firms of this city, particularly the Dolese & Shepard Company, the largest crushed stone dealers in the west, to understand that no slag would be sold by the company to any of the customers of said Dolese & Shepard if the latter company opposed the use of slag controlled by this company in the pavement of streets in the city of Chicago." But the court held such state of facts, if proven, would not constitute a defense to the application of the collector.

The appellant contends such facts established that the said improvement and ballast company obtained its bid to construct the improvement to be accepted as the lowest bid by stifling competition at the bidding and by limiting the number of bidders; that said improvement and ballast company had created a monopoly in the material to be used in constructing the improvement, and that the bid of said improvement and ballast company, and the contract based upon it, and likewise the special assessment levied to pay the contract price for the work, for these reasons were void and the assessment uncollectible, and that the court erred in adjudging the facts did not preclude the entry of judgment against the lands and lots belonging to him. This position is not tenable. It must be remembered the ordinance providing for the making of the improvement, and all of the proceedings under the ordinance save the letting of the contract to do the work, are regular and valid. The ground of objection to the payment of the benefits accruing to the [154] property of the appellant by reason of the improvement is, that the acts and conduct of the bidder previous to and at the time of the letting of the con-

tract by public bidding thereof was such as to limit the number of bidders for the contract to do the work, and that this may have enabled the successful bidder to receive a better contract than he otherwise might have been able to obtain. The proffered testimony did not tend to show that the amount to be paid for the work under the letting to the Illinois Improvement and Ballast Company was more than a fair contract price therefor. It did not disclose when the appellant received knowledge of the facts which he contends may have operated to limit the number of bidders. For all that is shown it may be that the bid was entirely fair in amount, and that the appellant, though knowing all the facts he now relies upon to acquit his property of liability to pay the benefits arising thereto by the improvement, stood by and knowingly permitted the improvement and ballast company to complete the improvement of the street. A bid at a public letting of contracts for the work to be done under ordinances of this character, though that of the lowest responsible bidder, may be rejected for the reason that it resulted from a combination between bidders, or from the act of the successful bidder to limit the number of bidders or increase the contract price. Paragraph 583 of chapter 24, entitled "Cities," etc. (Hurd's Stats. 1899, p. 378), expressly authorized the board of local improvements to reject bids for such causes, or for any cause, if deemed by them best for the public good. If a bid is accepted by the board of local improvements, still, if the causes stated authorizing its rejection existed, it may be avoided by any property holder whose interests are prejudiced thereby, if such property holder seasonably takes action to have the bid declared invalid. If the property holder is advised that grounds exist which justified the rejection of the bid and contract thereunder, it is his [155] duty, if he regards the contract arising from the bid as unfair and detrimental to him, and wishes to repudiate it, to take action to have the contract repudiated or vacated without any unreasonable delay. The bid and contract are not void, but voidable, and may be enforced against the bidder. The option to have the bid and contract rejected or avoided is with the property owner, and he cannot be permitted to withhold his objection until he shall have secured the benefit of the work, labor, and materials of the contractor, and then ask to be relieved of all liability to pay therefor. The principle which governs such instances was declared and applied in Hamilton

v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562, Bush v. Sherman, 80 Ill. 160, Connely v. Rue, 148 Ill. 207, 35 N. E. 824, and Ingalls v. Rowell, 149 Ill. 163, 36 N. E. 1016.

The cases of Fishburn v. City of Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 49 N. E. 532, and Conway v. Garden City Paving Co., 190 Ill. 89, 60 N. E. 82, are cited and relied upon by counsel for appellant in support of the contention the county court should have denied judgment against the property of appellant on the ground the facts submitted to the court disclosed that the said improvement and ballast company had a monopoly of the material necessary to construct the improvement, and dictated the price thereof to other contractors, and thereby also stifled competition in bidding for the contract to do the work. In the former of the cases cited the objection was made to the confirmation of the assessment on the ground the ordinance tended to create a monopoly, and we held the objection was well advanced and judgment confirming the assessment was denied. In the latter case the parties to a combination to limit competition among bidders for a contract to construct public improvements sought and were refused the aid of the court to enforce the agreement entered into between themselves in effecting the illegal combination. Clearly, neither case touches the principle which must here control.

The judgment is affirmed.

The Letting of Contracts for Public Work to the lowest bidders is considered in the monographic note to State v. Rickards, 50 Am. St. Rep. 489-497.

Public Improvement—Estoppel.—One owning property abutting on a street is not estopped to deny the validity of an assessment for street improvements, when it is made without any fair opportunity to him to contest its correctness: Hutcheson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884, 51 S. W. 848. But laches on the part of taxpayers in objecting to or resisting a public improvement may afterward estop them from denying liability thereunder, if, during their inaction, a contractor or other person has incurred liabilities or made expenditures in good faith: Hutchinson etc. R. R. Co. v. Board of Commrs., 48 Kan. 70, 30 Am. St. Rep. 273, 28 Pac. 1078.

FAY v. SLAUGHTER.

[194 Ill. 157, 62 N. E. 592.]

AGENCY—POWER OF ATTORNEY—INDORSEMENT OF CHECKS.—Power of attorney given to an agent to indorse checks of the principal for deposit in a certain bank authorizes the indorsement of such checks only as are the property of the principal, and not those acquired by the agent in an unlawful or unauthorized manner. (pp. 150, 152.)

AGENCY—POWER TO RATIFY UNAUTHORIZED ACTS.—An agent with authority to do certain lawful things cannot, by virtue of that authority, ratify his own unlawful and unauthorized acts so as to bind his principal. (p. 152.)

AGENCY—EMBEZZLEMENT BY AGENT—LIABILITY OF PRINCIPAL.—If an agent forges his principal's name to securities and sells them through brokers, who fail to ascertain the genuineness of the indorsements, the fact that the agent embezzles the proceeds of the check given in payment by virtue of a power of attorney to indorse and draw checks during the absence of the principal does not render the latter liable to the brokers for the embezzlement, if he repudiates the sale immediately upon ascertaining the facts. The fact that the existence of the power of attorney was unknown to the brokers is immaterial. (pp. 152, 153.)

H. S. Robbins and Holt, Wheeler & Sidley, for the appellant.

W. H. Swift and Ullmann & Hacker, for the appellees.

[163] RICKS, J. This is an action upon the common counts for money had and received. It is in the nature of an equitable proceeding at law. "The principle governing in such case is, that the possession of money has been obtained which cannot conscientiously be withheld. Such an action is designed for the advancement of justice, and it is applicable where a person receives money which in equity and [164] good conscience he ought to refund. The defense to the claim, as well as the claim itself, is governed by the same principles. In speaking of this action, Lord Mansfield, in Moses v. MacFerlan, 2 Burr. 1010, said: 'It is the most favorable way in which he can be sued. He can be liable no further than the money he has received, and against that may go into every equitable defense upon the general issue. He may claim every equitable allowance, etc. In short, he may defend himself by everything which shows that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or any part of it'": Board of Supervisors of Stephenson County v. Manny, 56 Ill. 160.

A peremptory instruction was given at the close of all the evidence directing a verdict for defendants in error, plaintiffs below, and the question presented is, whether, under the foregoing statement of facts, the action of the appellate court in approving the giving of this instruction can be sustained.

The undisputed evidence is, that between September 13 and October 4, 1894, Charles E. Anderson, pretending to act as agent for plaintiff in error, received from defendants in error four checks on the Merchants' National Bank of Chicago, aggregating twenty-two thousand one hundred and thirty-seven dollars and fifty cents, written to the plaintiff in error, for two certificates of stock of the Chicago Edison Company, each for one hundred shares, the property of plaintiff in error, which could only be sold or disposed of by plaintiff in error's indorsement; that Anderson forged this indorsement; that he neither had authority to sell the stock nor indorse plaintiff in error's name thereon; that plaintiff in error was absent from the city of Chicago from June to October 8th or 9th of that year, and that he had no actual knowledge of the transaction until his return, when he repudiated it; that Anderson was the clerk and bookkeeper of plaintiff in error, having authority to collect rents from certain real estate owned by plaintiff in error in Chicago, which was verbal, and that he also had a power of attorney, made by plaintiff
165 in error shortly before going away, by which he was authorized to draw checks, bills of exchange, and drafts, and make orders and overdrafts upon the Northern Trust Company of Chicago, and indorse checks, drafts, bills of exchange, notes or orders for deposit in such Northern Trust Company; that Anderson did indorse the four checks received from defendants in error and did deposit the same to the account of the plaintiff in error with the Northern Trust Company, and did draw all that money so deposited and nine hundred and fifty dollars of plaintiff in error's, all of which he embezzled before the return of plaintiff in error and before he had any knowledge of the transaction.

It is not insisted by defendants in error that Anderson had any express authority to sell the stock and receive the checks in question, nor is it contended that there was anything in the conduct of Fay, or the previous course of dealing of Anderson with Fay's knowledge, from which any implied authority to do such acts could arise, but the contention on the part of defendants in error is, that although he

had no authority to receive these checks or to sell the stock and sign the name of plaintiff in error to it, yet having authority to indorse checks for deposit to plaintiff in error's account in the particular bank where these checks were deposited, and having authority to draw checks on that account, plaintiff in error, by the act of Anderson in indorsing the checks and having the money placed to his account, received the benefit of the money and is liable in this action.

Defendants in error had no knowledge of the existence of this power of attorney until long after this entire transaction, and did not deal, nor do they pretend to have dealt, with Anderson upon the faith of it. It is clear, therefore, that whatever they did was without reference to this power of attorney, and any authority given under it cannot be relied upon by them as a matter of estoppel against plaintiff in error. But they argue that plaintiff in error, having given Anderson power to indorse checks, [166] and he having exercised that power and indorsed the checks in question and placed the money to the credit of plaintiff in error, plaintiff in error by that act became chargeable with the money. Upon what theory of law could plaintiff in error become liable for this money? We think of but two: 1. By having knowledge of the transaction and ratifying it; 2. By receiving the benefits of the transaction, the legal effect of which must be to raise, by implication, a ratification.

It is not insisted that plaintiff in error expressly ratified the acts of Anderson, nor is it contended that he actually received the benefits of this money, but it is said that by giving Anderson the power to indorse checks for deposit, that power carried with it the implied power, at least, to ratify the transaction and to bind plaintiff in error. Let us for a moment see what power Anderson did have. As has been stated, he was the agent of plaintiff in error to receive rents, and as clerk of plaintiff in error he would be authorized to receive whatever checks or moneys plaintiff in error gave him or authorized any other person to give him. In other words, he was authorized to receive checks belonging to plaintiff in error, and checks so belonging to plaintiff in error and so received by Anderson he had written authority to indorse for deposit only to the credit of plaintiff in error. To get these checks he made an unauthorized sale of plaintiff in error's property, and in order to effect that sale committed forgery. Such being the manner and circumstances under which he re-

ceived these checks, can we say, as a matter of law or fact, that they were the checks of plaintiff in error or that Anderson had any right to receive them for him? By the laws of England and several of the states plaintiff in error could not have ratified a transaction growing out of a forgery: 1 Am. & Eng. Ency. of Law, 2d ed., 1185; Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; Brook v. Hook, 24 L. T., N. S., 34, 40 L. J. Ex. 50. In the case at bar there was no pretended authority to act for Fay. The pretense [167] was that Fay was acting for himself, and to that end had assigned the stock, and that Anderson was acting merely as the messenger or spokesman of Fay in the transaction. He did not pretend that he had authority to sign Fay's name, or that he was agent to make the sale, but did pretend that Fay had signed his own name and personally directed the sale, and the above authorities are to the effect that when a forgery is committed there can be no pretense of authority, and, as is said in Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606: "It is difficult to understand how one who is, in a sense, the victim of the criminal act, may adopt or ratify it." By the decisions of this state he might do so, but he would only be held to do so when it was shown that with a full knowledge of all the material facts he did ratify it: Livings v. Wiler, 32 Ill. 387; Hefner v. Vandolah, 57 Ill. 520, 11 Am. Rep. 39; Chicago Edison Co. v. Fay, 164 Ill. 323, 45 N. E. 534.

The evidence shows that eight per cent of the depositors of the First National Bank of Chicago—which is one of the largest in that city—and a considerable per cent of the depositors of all the leading banks in Chicago, gave to third parties powers of attorney to indorse and draw checks. It further shows that up to the time this transaction was disclosed to plaintiff in error he never had any reason to suspect that Anderson was dishonest. It cannot, therefore, be said that the exercise of a rule of business that so largely obtained in that locality was negligence. Nor was it unlawful for plaintiff in error to have given Anderson the power he did give him. But, without expressly saying so, the argument of defendants in error proceeds upon the theory that by reason of that power of attorney Anderson was enabled to do an act which was equivalent, in law, to the ratification by plaintiff in error of Anderson's own criminal act. Until plaintiff in error did ratify Anderson's acts these checks were not the

property of plaintiff in error, and Anderson had no legal authority to receive them for or on behalf of plaintiff in error. The necessary implication of law [168] would be that the authority given to Anderson under the power to indorse checks for deposit to plaintiff in error's account would be to indorse plaintiff in error's checks; that is, checks that were the property of plaintiff in error—not the checks of strangers to plaintiff in error's business, or checks that Anderson might in any unauthorized manner acquire, but such checks as we would presume plaintiff in error would himself indorse. An action for money had and received will lie against one who receives stolen money from the thief: Hindmarch v. Hoffman, 127 Pa. St. 284, 14 Am. St. Rep. 842, 18 Atl. 14. Suppose these checks, drawn as they were, had been stolen by Anderson from the drawers and thus indorsed and passed through the account of plaintiff in error, and the money checked out and stolen by Anderson before plaintiff in error had any knowledge of the theft; would they, in that case, be the property of plaintiff in error, and would Anderson be acting for plaintiff in error any more than if he had gone and stolen a like sum of money and put it in plaintiff in error's money box and again stolen it out without the knowledge of plaintiff in error? And in either of those cases, would an action lie against plaintiff in error for that money on the theory that plaintiff in error had received it? Anderson, having authority to do certain lawful things, could not, by virtue of that authority, ratify his own unauthorized and illegal acts so as to bind his principal: Hotchin v. Kent, 8 Mich. 526; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Am. & Eng. Ency. of Law, 2d ed., 1183. Having no authority to receive the checks in question, they being the fruits of his crime, he would not, by the exercise of his legal authority to indorse checks, ratify this transaction. In Trudo v. Anderson, the court says (10 Mich. 367, 81 Am. Dec. 798): "An agent cannot ratify an act done by himself or his servant beyond the scope of the agency, so as to bind the principal; otherwise an agent might enlarge his own powers to any extent, without his principal's consent."

[169] Defendants in error were bound to know that the signature to the assignment of the stock was genuine. They dealt with Anderson, so far as he entered into it at all, at their peril, and having been guilty of the first wrong in

accepting the forged assignment of these stocks, it being their duty to have verified the signature of plaintiff in error before doing so, and having placed it within the power of Anderson to have perpetrated a fraud and injury upon both plaintiff in error and defendants in error, the defendants in error are not in a condition to say that both parties were equally at fault. As against plaintiff in error they were guilty of a wrong when they received from Anderson plaintiff in error's property upon this forged indorsement, and we are unable to see wherein plaintiff in error was guilty of any wrong. He at no time or place trusted Anderson with this property in a manner that could have enabled him, except by the forgery, to have disposed of it. What act of plaintiff in error, then, can be said to have been a ratification of this transaction? We do not regard it enough that the money should have simply gone into his account, under the circumstances shown in this case. In the absence of express ratification, leaving aside the equitable view of it, he could not be deemed, in law, by implication, to have ratified the acts of Anderson unless with a knowledge of its source, and the material facts relating to the manner in which it came into his bank account were brought home to him, and then, with that knowledge, appropriated the money, or part of it, to his use: Hotchin v. Kent, 8 Mich. 526; Pope v. Lowitz, 14 Ill. App. 96; Mathews v. Hamilton, 23 Ill. 470; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; 1 Am. & Eng. Ency. of Law, 2d ed., 1196.

There are a number of well-considered cases holding that it is not sufficient, to charge a principal, to show that money or property is by the unauthorized act of the agent brought into the principal's business and used, without the knowledge of the principal of its use or of [170] the unauthorized manner of getting it: Steam Navigation Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Hotchin v. Kent, 8 Mich. 526; Bohort v. Oberne, 36 Kan. 386, 13 Pac. 388; Spooner v. Thompson, 48 Vt. 259; Thatcher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Pope v. Lowitz, 14 Ill. App. 96. But as these cases, in this form of action, seem to proceed upon equitable ground, we have in the case of First Nat. Bank of Las Vegas v. Oberne, 121 Ill. 25, 7 N. E. 85, carried the rule so far as to hold that although the agent did not have authority to do the particular act by which the money was obtained, and although

the principal did not know of the act or of the fact that the money had been used by his agent for his benefit, yet if the evidence showed that the principal, in his business, in fact got the benefit of the money, in whole or in part, he would be liable for such part as the evidence showed he did get the benefit of. We think that is carrying the rule as far as it ought to be carried. We are unable to concur in the view that the mere passing of this money through the bank account of plaintiff in error without authority given by him, and in the absence of evidence showing it went to his benefit or was used by or for him, can be held to be such receiving of the money of defendants in error by him as in equity and good conscience renders him liable for money had and received for the use of defendants in error. In this record there is no evidence showing, or tending to show, that plaintiff in error got the real benefit of any of this money, either by checking it out for his own use or by its being checked and applied to his business. There is evidence showing that before Anderson got any of the checks from Slaughter he had embezzled about two thousand seven hundred dollars, and that his total embezzlements were all that he got from defendants in error and nine hundred and fifty dollars of plaintiff in error's money, so that eighteen hundred and twenty-five dollars of defendants in error's money went toward balancing the two thousand seven hundred dollars embezzled by Anderson prior to the deposit of the first of plaintiff in error's checks, and in that manner went to the benefit of [171] Fay's business. As a matter of fact, the evidence shows that Fay himself, and from his own proper resources, deposited one thousand and eighty-four dollars and eighty-four cents more than was checked out for his legitimate affairs, and that there was only one hundred and thirty-four dollars and eighty-four cents in the bank when he came home. However, we regard Fay's admission as sufficient to charge him with that amount, and no more.

Entertaining the views herein expressed, we think the trial court erred in instructing the jury to find a verdict for plaintiffs, and that the appellate court should not have affirmed that action. The judgments of the branch appellate court for the first district and of the superior court of Cook county are reversed, and the cause is remanded to the superior court for any further proceedings in accordance with this opinion.

The Question of Embezzlement is considered at length in monographic note to Eggleston v. State, 87 Am. St. Rep. 21-46.

The Liability of a Principal for the unauthorized acts of his agent is the subject of an extended note to Franklin Fire Ins. Co. v. Bradford, 201 Pa. St. 32, post, pp. 779-799, 50 Atl. 286.

SPRINGER v. DE WOLF.

[194 Ill. 218, 62 N. E. 542.]

LANDLORD AND TENANT—ASSIGNMENT OF LEASE.—If there is no assumption by the assignee of a lease of the obligations thereof, then, as between the lessor and his assignee, there is privity of estate only. The assignee is liable for the rent while such privity exists, and may terminate his liability by assigning the lease and going out of possession. (pp. 157, 158.)

LANDLORD AND TENANT—ASSIGNEE OF LEASE, WHEN MAY NOT TERMINATE HIS LIABILITY.—If an assignment of a lease, to which the lessor assents, recites that the lessee, for a certain sum, "and in consideration of the assumption by the assignee of all the obligations and liabilities of the lessee arising out of the lease," has sold and assigned the leasehold estate to the assignee, there is privity of contract between the lessor and the assignee, which cannot be terminated by the latter by again assigning the lease and surrendering possession. (p. 159.)

W. N. Gemmill, for the appellant.

Paddock & Billings, for the appellee.

218 PER CURIAM. The branch appellate court, in affirming, on appeal, the decree of the superior court, made the statement and rendered the opinion following:

"In this case a bill was filed by appellee to foreclose a lien for rent under a ninety-nine year ground lease of the premises known as 188 Monroe street, Chicago. Said lease is dated November 24, 1888, and is by Calvin De Wolf, lessor, to William E. Slosson, lessee. The fee simple title to said premises passed by conveyance from Calvin De Wolf to Wallace De Wolf, and from the latter 219 to the appellee, prior to the filing of said bill. April 4, 1899, said Slosson executed and delivered to the appellant the following transfer or conveyance, to wit:

"'For fifteen hundred ($1,500) dollars in hand paid by Warren Springer, of Chicago, Illinois, to William E. Slosson, lessee in the within lease, and in consideration of the assumption by the said Warren Springer of all the obligations and

liabilities of the lessee arising under said lease, the said William E. Slosson and Katie F. Slosson, his wife, have sold, assigned and transferred, and do hereby sell, assign and transfer, to the said Warren Springer, all the right, title and interest of the lessee herein in and to the within described premises, with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, for the whole of the remainder of the term of said lease, and for all renewals and extension thereof, and all dower and other rights of Katie F. Slosson.

"'Signed and sealed at Chicago, Illinois, this fourth day of April, 1889. WILLIAM E. SLOSSON. [Seal]

"'KATIE F. SLOSSON. [Seal]'

"A copy of the above was inclosed in the following letter from appellant, to wit:

"'Warren Springer, Real Estate and Loans,
207 South Canal St., Chicago, May 22, 1889.

"'Wallace L. De Wolf, 184 Dearborn St., City:

"'Dear Sir—I inclose you herewith a copy of the assignment of William E. Slosson to me of the lease of the premises on Monroe street, as per your request this day. Please send me your written consent to this assignment, as well as your assent to the extension of the time for putting the improvements on the said premises to June 1, 1890, all confirming our conversation of this day, and very much oblige.

"'Yours truly, WARREN SPRINGER.'

"Afterward the appellee and the appellant executed their certain agreement in writing, dated July 29, 1890, in which it is agreed by and between them that the time for placing the improvements on said premises be extended to January 29, 1892, and that in the meantime the appellant should, in addition to the performance of the other covenants in said lease, furnish to appellee insurance on the buildings then upon said premises in the sum of five thousand dollars. Afterward the same parties, by their agreement [220] in writing dated June 30, 1891, further extended the time for making said improvements to January 1, 1895, which also provided that appellant would furnish to appellee insurance upon said buildings in the sum of six thousand dollars, 'in addition to the performance of the other covenants in said lease.'

"Upon the said conveyance or transfer to appellant by said Slosson, April 4, 1889, appellant went into possession

of said premises, and continued in said possession until July 29, 1897. Appellant assigned said lease to John McGinniss by his instrument in writing of that date, and said McGinniss, under date of August 6, 1897, assigned said lease to Charles E. Miller. Subsequent to the time when appellant turned over the possession of said premises to McGinniss nine payments were made to appellee on account of the rent due under said lease, each and all by the check of appellant, the last one being February 5, 1898. The bill of complaint was filed on March 3, 1898. The appellant and said Slosson, McGinniss, and Miller, with others, were made parties defendant to said bill.

"In the trial court a decree was entered, wherein it was found that there was due to appellee, under said lease, the sum of twelve thousand eight hundred and seventy-six dollars and thirteen cents, which included rent up to the time of the entry of such decree; that appellant was personally liable therefor; that of said sum of twelve thousand eight hundred and seventy-six dollars and thirteen cents, the sum of nine thousand two hundred and ninety-three dollars and sixty-four cents accrued after the assignment to said Miller, and who is also personally liable to appellee therefor, and that the master proceed to sell the interest of the parties defendant in and to said premises. The appellant, Warren Springer, alone appealed from that decree."

HORTON, J. "The important question in this case is whether the appellant is liable for the ground rent reserved by the lease mentioned, and accruing after the conveyance by him to McGinniss. All the substantial questions presented in the brief of counsel for appellant are embraced in that proposition. To determine that question we must [221] consider whether there was privity of contract as well as of estate between the appellant and the appellee. As between the lessor and the lessee both exist, but the privity of estate may be terminated by an assignment of the lease by the lessee. Not so as to the privity of contract. The lessee cannot shake off his contractual liability by making such an assignment. When there is no assumption by the assignee of the obligations of the lease, then, as between the lessor and the assignee, there is privity of estate only, and the assignee is liable for the rent while such privity of estate exists, and no longer. But the assignee may terminate such

liability by assigning the lease and going out of possession: Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105.

"In the conveyance from Slosson to the appellant, dated April 4, 1889, it is provided that for fifteen hundred dollars, 'and in consideration of the assumption by said Warren Springer of all the obligations and liabilities of the lessee arising under said lease,' Slosson and wife 'sold, assigned, and transferred' to appellant the leasehold estate. It will be noticed that that transfer is a conveyance of such estate. It does not, in its language, purport to assign the lease, although it has that effect in law. By their certain quitclaim, also dated April 4, 1889, said Slosson and wife conveyed to appellant the building situated upon the demised premises, in which quitclaim it is stated that said Slosson had that day 'sold and assigned said lease, and all the right, title, and interest of the lessee therein,' to appellant.

"In its relation to the question now under consideration —that is, the assumption of liabilities by the appellant—we apprehend it makes but little, if any, difference whether the transfer of the leasehold estate is in form an assignment or a conveyance. The principle upon which the question of liability rests is substantially the same in either case. That conveyance of the leasehold was accepted by appellant, and he went into possession of [222] the demised premises. A part of the consideration for such conveyance, as therein expressed, was 'the assumption by the said Warren Springer of all the obligations and liabilities of the lessee arising under said lease.' What is the legal meaning and effect of that assumption?

"The definition of the word 'assume,' in matters of law, is, 'to take upon one's self.' The word 'assumption,' used in such a connection, as defined in the Century Dictionary, means, 'the agreement of the transferee of property to pay obligations of the transferrer which are chargeable on it.' Had that conveyance of the leasehold stated that it was made subject to the payment of rent, etc., it would have involved or created no liability upon the part of the appellant for rent accruing after he had assigned the lease and ceased to occupy the premises: Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105. But the phraseology and formation of the sentence is such that the assumption of the obligation and liabilities of the lessee cannot possibly be construed as meaning subject to such obligations and liabilities. Such assumption is a part of the consideration for the conveyance. How

can the fact that a conveyance is made subject to certain obligations and liabilities be construed to constitute a part of the consideration for the making of such conveyance? And further, the conveyance in question only purports to convey the 'right, title and interest' of the lessee. Without the assumption clause that would be a conveyance, and the appellant would take subject to the obligations and liabilities of the lessee under the lease. That would have created a privity of estate only, and the appellant, by accepting the same and entering into possession, would have incurred no liability except for the rent for the time he was in possession and occupancy. Hence, if the contention of counsel for appellant be correct, the assumption clause was unnecessary and did not change or add anything to the conveyance, and the construction to be given to the conveyance would be the same as it 223 would be if the assumption clause was not a part of it. We cannot concur in that construction. It must be that that clause means just what it says—that the appellant assumed the liabilities it expressed.

"Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467 (cited with approval in Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105), was a proceeding against the grantee in a conveyance of real estate containing the following clause, viz.: 'Subject, however, to the two trust deeds, the taxes and claims aforesaid, all of which the said party of the second part hereby assumes and agrees to pay as part of the consideration of this conveyance.' The grantee was held to be liable. That is the settled law for this state.

"A clause in the deed under consideration in Douglas v. Cross, 56 How. Pr. 300, was as follows: 'Subject, however, to the assumption, as a part of the consideration' of the conveyance, of a certain mortgage. It was there held that this language amounted to an agreement on the part of the grantee to pay the mortgage.

"In Schley v. Pryer, 100 N. Y. 71, 2 N. E. 280, the clause in the deed which the court of appeals was called upon to construe read as follows: 'This conveyance is made subject to two certain mortgages for four thousand dollars each, and which said party of the second part assumes, with interest from the twenty-second day of August, 1871.' The contention in that case, as in the case at bar, was that the language was not broad enough to impose a personal liability upon the grantee. In the opinion holding that the grantee was per-

sonally liable the court said (100 N. Y. 74, 2 N. E. 280): The defendant claims that the word "assumes" is not broad enough to impose a personal liability upon him to pay the mortgage in question. If it had been intended simply to provide that he should take the land subject to the two mortgages, the further language in this clause in which the word "assumes" appears would not have been necessary. Unless that word was used to impose a personal liability upon the defendant to pay, it was wholly unnecessary [224] and serves no purpose and adds nothing to the force of the language used. A rule of construction requires us to give force and effect, if possible, to all the language used. That word is frequently used in deeds to impose a liability to pay upon the grantee, and we believe it is generally understood among conveyancers to impose such liability. Such effect has been given to the word when so used in several well-considered cases in other states: Drury v. Tremont Imp. Co., 13 Allen, 168; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Stout v. Folger, 34 Iowa, 71, 11 Am. Rep. 138; Sparkman v. Gove, 44 N. J. L. 252. The word, therefore, must have the same meaning which it would have if the words "to pay" followed it. If not, what does it mean?'

"The language of the assumption clause in the case at bar is much stronger against the contention of counsel than that in the case just cited. In the latter, the language was simply that the grantee assumed the encumbrances, while in the case at bar the assumption was a part of the consideration for the conveyance.

"There are some technical objections made by appellant, such as that there is no consideration for the alleged assumption; that it does not appear that the conveyance to appellant was of the leasehold estate in question, and that such conveyance is void under the statute of frauds because it is not signed by the appellant. We have considered such objections and are of opinion that they are without merit. The appellant received a conveyance of the leasehold estate, received possession of such estate, and assumed to pay the rent. There was thereby established between the appellant and the appellee a privity of contract and a privity of estate. That privity of estate was terminated by the conveyance and transfer of possession of the demised premises to McGinnis. But the privity of contract—the contractual liability of the appellant—was not thus terminated. No valid reason is ap-

parent to us why the appellant should not pay the rent he assumed."

The decision and opinion of the branch appellate court are clearly in accordance with the authorities and with the settled law of this state, and that opinion is hereby adopted as the opinion of this court, and the judgment of the appellate court is affirmed.

The Assignment of Leases, and the respective rights and liabilities of the lessor, assignee, and assignor thereafter, are considered in the monographic note to Washington Nat. Gas Co. v. Johnson, 10 Am. St. Rep. 557-565. The relations of landlord and assignee of the term do not result from contract but from privity of estate: Sexton v. Chicago Storage Co., 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920; Bell v. American Protective League, 163 Mass. 558, 47 Am. St. Rep. 481, 40 N. E. 857. The lessee continues liable on his covenants, notwithstanding his assignment of the lease, because of the privity of contract with the lessor. The assignee is fixed with notice of the covenants, and takes the estate cum onere; but as his liability grows out of privity of estate only with the lessor, it ceases when the privity ceases: Washington Nat. Gas Co. v. Johnson, 123 Pa. St. 576, 10 Am. St. Rep. 553, 16 Atl. 499. He may exonerate himself by assigning to another: Note to Washington Nat. Gas Co. v. Johnson, 10 Am. St. Rep. 559.

CHICAGO AND ALTON RAILROAD CO. v. EATON.

[194 Ill. 441, 62 N. E. 784.]

EVIDENCE.—THE ADOPTION BY A RAILROAD COMPANY OF A RULE requiring the placing of flagmen and torpedoes where a rail is taken from the track is an admission by the company that ordinary care required such course of conduct. (p. 162.)

RAILROADS—RULES—RIGHT OF EMPLOYÉ TO RELY UPON OBSERVANCE OF.—A railroad engineer has a right to rely upon the observance by a track gang of the company's rule that flagmen and torpedoes will be placed where a rail has been removed from the track, whether he has received notice to look out for such track gang at a certain point or not. (p. 163.)

RAILROADS—DUTY TO SERVANTS—DELEGATION OF DUTY.—It is the duty of a railroad company to furnish its engineer a reasonably safe track upon which to operate his engine, and it cannot delegate that duty, nor the duty to notify such engineer that a rail has been removed from the track at a certain point on his run. (p. 163.)

MASTER AND SERVANT—VICE-PRINCIPAL.—If a master intrusts the performance of a duty due to his servant to another servant or agent, the latter occupies the place of the master as respects such performance, and the negligence of such servant or agent in performing the duty is the negligence of the master. (p. 164.)

A. E. De Mange and W. Brown, for the appellant.

L. Fitz Henry and Barry, Morrissey & Fifer, for the appellee.

[443] HAND, J. This is an action on the case, brought by the appellee, as administratrix, to recover damages by reason of the death of her intestate, Charles Eaton, alleged to have been caused by appellant in having a rail removed from its main track, between Atlanta and Lawndale, without giving him notice thereof as he approached it as engineer of a locomotive pulling a freight train composed of about sixty cars, some of which were loaded, whereby said engine was derailed. The jury returned a verdict in favor of the appellee for five thousand dollars, upon which the court rendered judgment, which judgment has been affirmed by the appellate court for the third district, and a further appeal has been prosecuted to this court.

At the time of the injury the appellant had in force a rule requiring that when a rail is taken out a flagman or red flag must be stationed in each direction two thousand yards from that point, and two torpedoes placed on the rail on the engineer's side. If in the vicinity of a descending grade, the distance must be doubled. The train upon which Eaton was engineer left Bloomington on the morning of October 16, 1900, going south. At that time the trackmen of appellant, consisting of two gangs, were working about a mile and one-half north of Lawndale, [444] taking up and relaying track, the section men being a short distance north of the steel gang. The steel gang had removed a rail. It is not claimed any torpedoes were laid, and there is a conflict in the evidence as to whether a flagman or red flag was stationed as required by the rule. The section men and steel gang, as the train approached around a curve coming down grade, gave signals to stop, but although the deceased made every effort to stop the train after receiving such signals he was unable to do so, and the engine ran into the gap where the rail had been taken out, and turned over, and Eaton was caught beneath the same and killed.

It is first assigned as error that the court declined to instruct the jury to find for the defendant. If there is evidence tending to establish a cause of action a peremptory instruction should be refused: Chicago Edison Co. v. Moren, 185 Ill. 571, 57 N. E. 773. A plaintiff is entitled to have his case

considered by the jury if the evidence tends to prove ordinary care on his part and negligence on the part of the defendant: Illinois Cent. R. R. Co. v. Sanders, 166 Ill. 270, 46 N. E. 799. Whether appellant was guilty of negligence or the deceased of contributory negligence are questions of fact for the jury, and the adoption of the rule above referred to is an admission by appellant that ordinary care required the course of conduct prescribed therein (Lake Shore etc. Ry. Co. v. Ward, 135 Ill. 511, 26 N. E. 520), and the jury would have been justified in finding that if said rule had been obeyed the accident would not have happened: Chicago etc. Ry. Co. v. Ryan, 165 Ill. 88, 46 N. E. 208. The train dispatcher at Bloomington testified that just before the train left, on the morning of the accident, he gave to Eaton a bulletin which read, "Look out for steel gang between Lincoln and Atlanta." No such bulletin was delivered to the conductor and none was found upon the body of Eaton, although his clothing was examined immediately after his death. But if it be conceded that he did receive the [445] bulletin, he had the right to rely upon appellant complying with its rule, and relying upon it he had the right to assume that a flagman or red flag would be stationed and torpedoes placed upon the rail at the place and in the manner therein provided, and that in the absence thereof he could safely proceed in the manner in which he did: Chicago etc. R. R. Co. v. Kelly, 182 Ill. 267, 54 N. E. 979. The court did not err in declining to take the case from the jury.

The giving of appellee's first instruction and the refusal of appellant's third and seventh instructions are assigned as error, on the ground that the court thereby eliminated from the case the fellow-servant question. We do not think the court erred in eliminating that question, as the question of fellow-servant is not in the case. It was the duty of appellant to furnish the deceased a reasonably safe track upon which to operate his engine, and it could not delegate that duty. Neither could it delegate the duty of notifying the deceased that the rail had been removed, so as to absolve itself from liability for a failure to communicate such information to the deceased: Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Peoria etc. Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951. In Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255, a section foreman had taken up a rail in repairing a track and failed to put out a signal to warn ap-

proaching trains, whereby a train was thrown off and a brakeman injured. The court say (26 Minn. 42, 1 N. W. 256): "In the instance of a railroad, the track is one of the instrumentalities for the working of the road, and therefore something which it is the absolute and personal duty of the master to employ due care in maintaining and keeping in a condition suitable to the purposes for which it is to be used—that is to say, in such condition that it can be safely used for such purposes. When such a master intrusts the performance of this duty to a servant or agent, such servant or agent occupies the place of the master as respects such performance, and [446] the negligence of such servant or agent in performing the duty is the negligence of the master himself."

The modification of appellant's first, second, and third instructions, by striking out the word "conduct" and inserting the word "negligence," was proper, and the refusal of the court to allow the appellant to recall the witness Wilson for further cross-examination was a matter resting in the sound discretion of the court, and was not, in our judgment, abused. He had already been fully cross-examined upon the same subject matter when upon the stand before.

We find no reversible error in this record. The judgment of the appellate court will be affirmed.

Railroads—Vice-principal.—A section master or foreman is the vice-principal of the railway company in the performance of any duty in the line of his employment, such as making the track safe, and the company is liable for his negligence whereby a trainman is injured. Thus, the company is liable where an employé on a wood train is injured through the negligence of a section foreman in taking up a rail for a track repair without putting out proper signals to warn approaching trains: See the monographic note to Mast v. Kern, 75 Am. St. Rep. 632, 633.

PEOPLE v. GORDON.

[194 Ill. 560, 62 N. E. 858.]

CONSTITUTIONAL LAW—PRACTICE OF MEDICINE.—A statute providing that any person shall be regarded as practicing medicine who "shall treat, or profess to treat, operate on, or prescribe for, any physical ailment or physical injury or deformity of another," is not unconstitutional as conferring special privileges upon special classes. (p. 166.)

MEDICINE—PRACTICE OF—WHAT IS.—A person who gives treatment, after a diagnosis, by rubbing or kneading the body to free the nerve force, as in osteopathic treatment, practices medicine, within the meaning of a statute providing that any person shall be regarded as practicing medicine who "shall treat, or profess to treat, operate on, or prescribe for any physical ailment, or physical deformity, or injury, of another," although such practitioner does not use drugs, medicine, or instruments, nor does he, by means of such treatment, treat the sick by "mental or spiritual means," alone. (p. 167.)

E. D. Reynolds and W. A. Shaw, for the appellant.

R. K. Welsh, for the appellee.

[567] WILKIN, C. J. In our view, the only question for decision here is, Did the evidence offered upon the trial fairly tend to prove the defendant guilty, within the proper construction of the act?

[568] It is contended by counsel for appellee that section 7 is unconstitutional, because the title is not broad enough to include it, and that the act is liable to the objection that it confers special privileges upon certain classes. In answer to these contentions we only deem it necessary to cite the cases of Williams v. People, 121 Ill. 84, 11 N. E. 881, and People v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923, in which these and other objections to the constitutionality of the law are fully discussed and the act sustained. It is true, these decisions were rendered under the acts of July 1, 1877, and July 1, 1887; but neither of them is materially different from the present law, so far as the objections here made are concerned. It is clear, we think from the several sections of this statute, that the state board of health is authorized to divide those who desire to practice medicine in this state into two classes—that is, those who desire to practice medicine and surgery in all their branches, and those who desire to practice any other system or science of treating human ailments without the use of medicine or instruments. Section 7 defines what shall

be regarded as practicing physicians, within the meaning of the act, as including both classes, and we are at a loss to perceive how it can be said that the defendant's own testimony does not tend to show that he did treat and operate on patients for physical ailments, within the meaning of that section. It is true, he says his treatment was a mental science; but that statement is completely refuted by his testimony as to what he did, and we think his evidence, as well as that of the witnesses sworn on behalf of the people, at least fairly tended to prove, if it did not fully establish, that he did not use magnetic treatment, as commonly understood. He said: "I first make a diagnosis, then I remove the cause for that condition by working and freeing the nerve force; I get as near the muscles as I can; if a person is fleshy it takes more force." He also flexed, or, as one witness says, bent the limbs. In short, all the [569] testimony tends to show that he practiced what is known as osteopathy—at least, the treatment was of that nature.

It is insisted by appellee that the act does not include persons who do not use drugs, medicines, or instruments, and in support of this position he cites Smith v. Lane, 24 Hun, 632; State v. Liffring, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168; Nelson v. State Board of Health, 22 Ky. Law Rep. 438, 57 S. W. 501; State v. Mylod, 20 R. I. 632, 40 Atl. 753. We have carefully examined these cases, and find that neither of them sustains the contention. The question decided in each of those cases was, whether persons giving treatment, as the defendant did in this case, as osteopaths and as Christian scientists were prohibited by the statutes of those states from administering to the sick and suffering, and it was held they were not. In other words, those decisions simply construe the statutes of their own states, none of which undertake, as does our act, to define the practice of medicine as including all 'who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another," and none of the statutes construed in those cases undertook to classify physicians, as our statute does. It is true, the court said in the Nelson case, speaking of the defendant as an osteopath: "Appellant is in no proper sense a physician or surgeon. He does not practice medicine. He is rather on the plane of a trained nurse. If by kneading and manipulating the body he can give relief from suffering, we see no reason why he should not be

paid for his labor, as other laborers. Services in kneading and manipulating the body are no more the practice of medicine than services in bathing a patient to allay his fever or the inflammation of a wound. Appellant may not prescribe or administer medicine or perform surgery, but so long as he confines himself to osteopathy, kneading and manipulating the body without the use of medicine or surgical appliances, he violates no law and appellee should not molest him."

[570] We hardly think the large school of osteopathists, and those who believe in their method and system of treatment, would be willing to concede that such treatment is no more than that which a trained nurse might administer. While it may be truthfully said that it is not the practice of medicine in the common acceptation of that term, it cannot be claimed that it does not "profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another," and certainly it cannot be insisted that such persons do not practice another "system or science of treating human ailments without the use of medicine internally or externally." Section 17 of the statute of Nebraska regulating the practice of medicine and surgery in that state provides: "Any person shall be regarded as practicing medicine, within the meaning of this act, who shall operate on, profess to heal or prescribe for or otherwise treat any physical or mental ailment of another," etc., and the supreme court of that state held in State v. Buswell, 40 Neb. 158, 58 N. W. 728, that the practice of treating patients for ailments by what is known as "Christian science" was a violation of that section.

But it is contended that the defendant in this case is shown by the testimony to be exempt from the operation of the statute by the last clause of the proviso to section 7—that is, that he is a person "who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy." We are unable to see how, under his own evidence, this position can be maintained. It is true, he does not use "drugs or other material remedy"; neither does he treat the "sick or suffering by mental or spiritual means," and therefore whether the word "material" is to be construed as meaning other treatment similar to the use of drugs is wholly immaterial. Very clearly this provision means that those who pretend to relieve the ailments of others by mere mental or spiritual means shall not be considered within [571] the act; but if the defendant, under

the proof in this case, can bring himself within that exception, then everyone who treats diseases without administering medicine, either externally or internally, can also be brought within the exception. Few, perhaps, if any, physicians attempt to treat the sick and suffering without appealing to the mental faculties, to a greater or less degree, in aid of the remedies they apply or prescribe; but that is not treating the sick by mental or spiritual means.

We all agree that the objects and purposes of this and similar statutes are to protect the sick and suffering, and the community at large, against the ignorant and unlearned who hold themselves out as being possessed of peculiar skill in the treatment of disease; from holding themselves out to the world as physicians and surgeons without having acquired any knowledge whatever of the human system or the diseases and ailments to which it is subject. Without some knowledge of the location and offices of the various nerves, muscles and joints, the manipulation of those parts and the flexing of the limbs cannot be intelligently, if, indeed, safely, practiced. Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and, as such, administering osteopathic treatment. The one properly falls within the profession of a trained nurse, while the other does not.

We think the circuit court erred in instructing the jury to find for the defendant, and that the appellate court erred in affirming that judgment.

An Osteopathist does not practice medicine in contravention of a statute that forbids anyone, without a certificate of qualification, to prescribe for the use of another "any drug, or medicine, or other agency": State v. Liffring, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168. See, in this connection, State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325.

ALSUP v. STEWART.

[194 Ill. 595, 62 N. E. 795.]

MORTGAGES — ADVERSE POSSESSION — GRANTEE OF MORTGAGOR.—PAYMENT OF TAXES by the grantee of a mortgagor in possession of the mortgaged premises, which he is bound to pay, does not constitute adverse possession. Such possession must be an actual, visible, exclusive appropriation of the land, commenced and continued under a claim of right. (p. 170.)

MORTGAGES — ADVERSE POSSESSION BY GRANTEE OF MORTGAGOR.—The possession of a grantee of a mortgagor is in subordination to the title of the mortgagee to the same extent as that of his grantor, and it cannot cease to be of that character until there is an open assertion of a distinct title with the knowledge of the mortgagee. (p. 171.)

MORTGAGES—ADVERSE POSSESSION.—POSSESSION BY A MORTGAGOR OR HIS GRANTEE is consistent with the rights and estate of the mortgagee, and in no sense adverse until a repudiation of the mortgage and a denial of the right and title of the mortgagee, so open and notorious that knowledge on his part must be presumed. (p. 171.)

MORTGAGES.—RIGHT OF A SUBSEQUENT PURCHASER FROM THE MORTGAGOR, not made a party to foreclosure of the mortgage, to redeem is unaffected by the decree, but the legal title to the mortgaged premises is sold at the sale and passes by the master's deed to the purchaser. (p. 171.)

ADVERSE POSSESSION MUST BE HOSTILE and under a claim of right, and not in recognition of the title of the real owner. (p. 172.)

J. C. Courtney and C. M. Fouts, for the appellant.

Sawyer & Evans, for the appellee.

596 CARTWRIGHT, J. Appellant brought this suit in ejectment in the circuit court of Massac county to recover the southeast quarter of the southwest quarter of section 25, township 16, range 6, in said county. There was a plea of the general issue, and a jury being waived there was a trial by the court. The issue was found for the defendant and judgment was entered against the plaintiff for costs.

Both parties claimed title from George A. Romines, a former owner of the land, plaintiff claiming through a mortgage executed by said Romines and the defendant through a subsequent deed of said Romines. On August 20, 1875, Romines executed the mortgage to Thomas Willis to secure the payment of one hundred dollars, with interest. On February 28, 1876, Romines made a deed of the land to the defendant, Henderson Stewart, who went into possession and has been in posses-

sion ever since. The mortgage was foreclosed in the circuit court of Massac county, and a decree was entered April 15, 1878, finding the amount due and ordering a sale of the land to satisfy the same. The widow and heirs at law of George A. Romines, then deceased, were defendants to the foreclosure suit, but the defendant in this suit, who had bought the land subject to the mortgage, was not made defendant. The land was sold, under the decree, to the mortgagee, Thomas Willis, and not being redeemed, the master in chancery executed a deed to him November 14, 1879. Thomas Willis executed his deed of the land to F. M. Clanahan, May 23, 1880. The next day, May 24, 1880, the defendant entered [597] into a contract with Clanahan for the purchase of the land. Clanahan executed a bond for a deed to the defendant, and the defendant executed his note for one hundred and seventy-seven dollars and ninety cents, with eight per cent interest, due on or before October 1, 1880. The bond was conditioned for the conveyance of the land on payment of this note. The defendant made payments on the note, and afterward, by indorsement on the bond, assigned the same to the plaintiff, who was his surety on a note to Clanahan. Plaintiff paid up the amount remaining due on the note to Clanahan, who executed a deed of the land to plaintiff on September 23, 1896. The defendant paid the taxes on the land from 1877 to 1883, inclusive.

The plaintiff proved record title in himself, but it is contended that the defendant made out a complete defense under the seven years limitation fixed by section 4 of the statute of limitations, in case of possession of land by actual residence thereon under a connected title, in law or equity, deducible of record, and also established title under section 6 of said statute, protecting persons in the actual possession of lands or tenements under claim and color of title made in good faith, with payment of taxes for seven successive years: 2 Starr and Curtis' Statutes of 1896, pp. 2604, 2605. He did not establish a defense under either of those sections, and the relations of the parties were such that he could not avail himself of their provisions. The possession required by the statute of limitations and protected by it is adverse possession, and the payment of taxes by the grantee of a mortgagor in possession of the mortgaged premises is not such a payment as is required by the statute. The possession must be an actual, visible, exclusive appropriation of the land, commenced and

continued under a claim of right. It must be hostile in its inception and so continue: Whiting v. Nicoll, 46 Ill. 230, 92 Am. Dec. 248; Medley v. Elliott, 62 Ill. 532. The possession of a mortgagor is not hostile to the title of the mortgagee or inconsistent with it: Chickering v. Failes, [598] 26 Ill. 507. The grantee of a mortgagor occupies the same position as his grantor, and has no greater right. The privity between the parties precludes adverse possession, and the possession of the grantee is in subordination to the title of the mortgagee to the same extent as that of his grantor. It cannot cease to be of that character until there is an open assertion of a distinct title with the knowledge of the mortgagee: Medley v. Elliott, 62 Ill. 532. It is the duty of the mortgagor in possession to pay the taxes on the mortgaged premises, and he can acquire no rights under any limitation law by the discharge of that duty. The mortgagee may regard the payment as a protection of his interest, and it is as much the duty of the grantee of the mortgagor to pay the taxes as it is the duty of the mortgagor himself. A purchaser from the mortgagor stands in his shoes, and is charged with notice of the mortgage and its legal effect: Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762. "The possession of the mortgagor is consistent with the rights and estate of the mortgagee, and in no sense adverse until a repudiation of the mortgage and denial of the right and title of the mortgagee, so open and notorious that knowledge on his part will be presumed": 1 Am. & Eng. Ency. of Law, 815. Defendant succeeded to the rights of Romines, but he was in no better condition. His possession was not adverse, and it was his duty to pay the taxes on the mortgaged premises.

Defendant was not made a party to the suit for the foreclosure of the mortgage, but that did not prevent the sale of the land and the transfer of the legal title, as has repeatedly been decided in this court. It is not the mortgage lien that is sold, but the property itself. If a subsequent purchaser from a mortgagor is not made a party to the foreclosure, his right to redeem will be unaffected by the decree, but the legal title to the mortgaged premises is sold at the sale and passes by the master's deed to the purchaser: Cutter v. Jones, 52 Ill. 84; Kelgour v. Wood, 64 Ill. 345; Taylor v. Adams, 115 Ill. 570, 4 N. E. 837. By the foreclosure, [599] and the subsequent sale and master's deed, the legal title to the premises passed to Willis, and through subsequent con-

veyances became vested in the complainant. Certainly, up to the time of the conveyance to Willis, November 14, 1879, the possession of the defendant was consistent with and subject to the title under the mortgage. The fact that he had paid taxes could not avail anything to him, and not having been made a party to the foreclosure, his relation to the legal title was not changed. He remained in possession with a right to redeem, and he bargained for a conveyance of the legal title on May 24, 1880. His possession under the executory contract of purchase was not adverse to Clanahan so long as the purchase money was not paid. An adverse possession must be hostile and under a claim of right, and not in recognition of the title of the real owner: Morse v. Seibold, 147 Ill. 318, 35 N. E. 369. Whether the contract of purchase would be available as an estoppel to dispute the title of Clanahan in an action of ejectment or not, it was a recognition of his title, and the evidence was admissible to show the real character of the possession by the defendant: 1 Am. & Eng. Ency. of Law, 2d ed., 797. The evidence showed that he recognized the title derived through the mortgage by contracting to purchase it and making payments on his contract. The defendant, having an equity of redemption, bargained for the legal title and then assigned his contract to his surety. He could not set up against such surety, to whom he had assigned the bond, a title under the statute of limitations by reason of a possession which was not adverse or on account of the payment of taxes which he was bound to pay.

The judgment is reversed and the cause remanded.

Adverse Possession of Property in general is considered in the monographic note to De Frieze v. Quint, 28 Am. St. Rep. 158-162. The possession of a mortgagor or his grantee is not adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties: Lewis v. Schwenn, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391. The grantee's possession will not be deemed adverse to the mortgagee unless there is an explicit disclaimer of holding under him, and an assertion of title in the grantee brought home to the mortgagee: Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572. In this connection, see Peshine v. Ord, 119 Cal. 311, 63 Am. St. Rep. 131, 51 Pac. 536.

VANCE v. RANKIN.

[194 Ill. 625, 62 N. E. 807.]

JUDICIAL NOTICE—ENACTMENT OF STATUTE.—The appellate court will take judicial notice of the enactment of a public statute relating to the subject matter of a suit while an appeal is pending without a formal supplemental plea. (p. 174.)

REMEDIES—REPEAL OF STATUTES.—If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them, and if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. (p. 174.)

REMEDIES—EFFECT OF REPEAL OF STATUTE.—If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when the decision is rendered. (p. 174.)

REMEDIES.—EFFECT OF REPEAL OF A STATUTE giving a special remedy is to obliterate it completely, and it must be considered as a law that never existed except for the purposes of those actions commenced, prosecuted, and concluded while it was an existing law. (p. 174.)

REMEDIES—REPEAL OF STATUTE.—The appellate court must reverse a judgment which was correct when pronounced in the lower court, if it appears that pending the appeal a statute necessary to support such judgment has been withdrawn by absolute repeal. (p. 175.)

REMEDIES—REPEAL OF STATUTE.—If a statute under which it is sought to coerce a village by mandamus to pass a certain ordinance is repealed pending an appeal from the judgment, without a saving clause as to existing suits, the repeal takes away the right to have the writ enforced, and the question of such repeal may be raised whenever an attempt is made to enforce the writ. (p. 177.)

Welty & Sterling and Barry, Morrissey & Fifer, for the appellants.

F. Y. Hamilton, for the appellees.

626 HAND, J. This is a petition for a writ of mandamus, filed by the appellees in the circuit court of McLean county, against the appellants, as president and trustees of the village of Danvers, to compel them, as such officers, to pass an ordinance disconnecting the territory mentioned in the petition from said village under the provisions of an act entitled "An act in relation to the disconnection of territory from cities and villages," in force May 29, 1879: Laws 1879, p. 77. A demurrer to the petition having been overruled, the appellants filed an answer thereto, 627 and a demurrer having been sustained to the answer, the appellants elected to stand by their answer,

and judgment was entered awarding a peremptory writ of mandamus against them requiring them to pass an ordinance disconnecting the territory as prayed for in the petition, from which judgment an appeal was perfected to the appellate court for the third district, where the judgment was affirmed, and a further appeal has been taken to this court.

On the tenth day of May, 1901, and while the appeal was pending in the appellate court, the legislature passed an act with an emergency clause, entitled "An act in relation to the disconnection of territory from cities and villages, and to repeal an act therein named" (Laws 1901, p. 96), whereby the act of May 29, 1879, which had been held by this court in Young v. Carey, 184 Ill. 613, 56 N. E. 960, to be mandatory, was repealed, and it was made discretionary with the trustees whether they would disconnect territory upon application of the owners thereof (People v. Binns, 192 Ill. 68, 61 N. E. 376), and which act provided that it "shall apply to and affect all cases where property has not been disconnected by such city council or trustees of such village, whether application has been made for disconnection or not." The act of May 10, 1901, being a public act, this court will take judicial notice thereof, without formal supplemental plea: Wikel v. Board of Commrs. of Jackson County, 120 N. C. 451, 27 S. E. 117. "It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after": South Carolina v. Gaillard, 101 U. S. 433. "If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered": Cooley's Constitutional Limitations, 2d ed., 381, and note. The effect of the repeal of a statute is to obliterate the 628 statute repealed as completely as if it had never been passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law: Ex parte McCardle, 7 Wall. 514; Key v. Goodwin, 4 Moore & P. 341; Thorne v. San Francisco (People v. Hays), 4 Cal. 165; Musgrove v. Vicksburg etc. R. R. Co., 50 Miss. 677; Town of Belvidere v. Warren R. R. Co., 34 N. J. L. 193. Pending judicial proceedings based upon a statute cannot proceed after its repeal: Gilleland v. Schuyler, 9 Kan. 569; Wade v. St. Mary's etc. School,

43 Md. 178; McMinn v. Bliss, 31 Cal. 122; State v. Daley, 29 Conn. 272. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal: Hartung v. People, 22 N. Y. 95; Hubbard v. State, 2 Tex. App. 506; Atwell v. Grant, 11 Md. 104; United States v. The Peggy, 1 Cranch, 103; Mayor of Annapolis v. State, 30 Md. 112. In Musgrove v. Vicksburg etc. R. R. Co., 50 Miss. 677, a judgment erroneous when pronounced was affirmed because the subsequent repeal of the statute freed it from error. In Keller v. State, 12 Md. 323, 71 Am. Dec. 596, the court having affirmed a judgment in ignorance of the repeal of a statute pending the appeal, afterward, at the same term, on its attention being called to the repeal, struck out the order of affirmance and in its place entered a judgment of reversal. In Wikel v. Board of Commrs. of Jackson Co., 120 N. C. 451, 27 S. E. 117, which was a petition for mandamus to compel the county commissioners to build a bridge and levy a tax for that purpose, as required by the act of 1895, which act, pending an appeal from a judgment granting a peremptory writ, was repealed, it [629] was held that the repeal of such act destroyed the subject matter of the action, and that the suit should abate.

The repeal of a statute conferring jurisdiction takes away all right to proceed thereunder unless it is expressly saved (Illinois etc. Canal v. City of Chicago, 14 Ill. 334), and it carries with it all prosecutions pending thereunder (Wilson v. Ohio etc. Ry. Co., 64 Ill. 542, 16 Am. Rep. 565), and except for the purposes of such suits as are begun, prosecuted and concluded while it is an existing law, the statute repealed is as if it never existed: Eaton v. Graham, 11 Ill. 619; Van Inwagen v. City of Chicago, 61 Ill. 31; Menard County v. Kincaid, 71 Ill. 587; Town of Jefferson v. People, 87 Ill. 503; Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031. In Van Inwagen v. City of Chicago, 61 Ill. 34, it is said: "The doctrine is, that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, and unless those rights have become so far per-

fected as to stand independent of the statute, ... that is to say, executed. The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." In Holcomb v. Boynton, 151 Ill. 297, 37 N. E. 1032, the court say: "Where a statute is repealed without such saving clause, it must be considered, except as to proceedings passed and closed, as if it had never existed." In People v. Binns, 192 Ill. 68, 61 N. E. 376, it was held the legislature had full power to repeal the act of 1879, and to make the act of 1901 applicable to proceedings pending thereunder, and that said act was not a private grant, in which a vested right to have the same remain unchanged could be acquired.

The judgment awarding the writ did not so far perfect the right of appellees to have their lands disconnected that such disconnection could be carried into effect [630] independently of the act of May 29, 1879, and solely by virtue of the judgment. The proceeding, therefore, for the disconnection of appellees' land was not passed, closed, and executed at the time of the repeal of the act of 1879, as such disconnection, under the statute, could only be made by the passage of an ordinance by appellants, and there is now no statute in force requiring them to pass an ordinance making such disconnection, and they are not concluded upon that question by the judgment, but the same may be raised by them when the court attempts, by attachment or otherwise, to coerce them to obey the peremptory writ and pass an ordinance disconnecting said territory. In Commissioners of Highways v. People, 31 Ill. 97, it was held that where a peremptory writ of mandamus was awarded against commissioners of highways commanding them to open a road, it was a sufficient excuse on the part of the commissioners, upon an attachment for contempt for not obeying the writ, that after it was ordered, and before it was issued and served, the road directed to be opened had been vacated by them in pursuance of authority conferred upon them by statute; and in State v. Harvey, 14 Wis. 151, that after a change in the statute which required an officer to perform a particular act, and under which mandamus had issued commanding him to perform such act, an attachment ought not to be issued against him for a failure to obey the writ, but

in such case the relator should make a new application for a writ, so that a decision might be had as to the duty of the officer under the law as it then existed.

The statute under which it is sought to coerce the appellants to disconnect the territory described in the petition having been repealed since the trial in the circuit court, and there being now no statute in force requiring them to make such disconnection, the judgments of the appellate and circuit courts are reversed.

The Effect of the Repeal of a Statute, without a saving clause, is to obliterate it as completely as though it never existed, except as to suits concluded while it was an existing law. Pending judicial proceedings based upon a statute cannot proceed after its repeal: Notes to Todd v. Landry, 12 Am. Dec. 480; Wharton v. State, 94 Am. Dec. 217-219; Mahoney v. State, 5 Wyo. 520, 63 Am. St. Rep. 64, 42 Pac. 12.

AMERICAN EXCHANGE NATIONAL BANK v. THEUMMLER.

[195 Ill. 90, 62 N. E. 932.]

BANKS AND BANKING — COLLECTIONS — RIGHT TO CREDIT PROCEEDS ON OVERDRAFT.—A blank indorsement of a check by the payee transfers a good title to the holder, free from all equities in the payee's favor, and a bank receiving from another bank a check indorsed in blank by the payee is authorized to collect it, credit the proceeds to the forwarding bank, honor its drafts against the credit, or apply the proceeds to the reduction of an overdraft upon it by the forwarding bank. The payee cannot, upon the insolvency of the latter bank, recover such proceeds from the bank making the collection, without proof that the latter had notice that the forwarding bank received the check merely as the payee's agent for collection. (pp. 178, 182.)

Swift, Campbell & Jones, for the appellant.

Lackner, Butz & Miller and J. E. Roehr, for the appellee.

95 MAGRUDER, J. When appellee left her draft, which was payable to her order, with the South Side Savings Bank of Milwaukee, she indorsed the draft in blank. She did not sell the draft to the South Side Savings Bank of Milwaukee, but left it for collection only. The draft was sent by the South Side Savings Bank of Milwaukee to the appellant to be collected, but the appellant, it is conceded, had no notice or knowledge that the draft had been left with the Milwaukee

bank for collection only, and that the Milwaukee bank received the draft from appellee, as agent, and not as owner. So far as appellant knew, under the admitted facts, the South Side Savings Bank of Milwaukee was the owner of the draft. The draft itself was not introduced in evidence, and, therefore, it is impossible to say whether there was anything upon the face of the draft which was calculated to put appellant upon inquiry as to whether the South Side Savings Bank held it for collection, or as owner. The instructions, asked by the appellant and refused by the court, announced to the jury that the possession by the South Side Savings Bank of the draft in controversy, indorsed in blank by the appellee, was prima facie evidence that the South Side Savings Bank was the owner of the draft, and that appellant had the right to treat the South Side Savings Bank as the owner thereof, and that appellant had the right to apply the proceeds of the collection of the draft to the payment or reduction of an overdraft of the South Side Savings Bank in the manner and under the circumstances set forth in the statement preceding this opinion, if, at the time appellant so applied the proceeds of the draft, it had no notice that the South Side Savings Bank held such draft for collection only for the appellee.

Under the decisions of this court, and under the decisions of the supreme court of the United States followed and indorsed by this court, the instructions so [96] refused stated the law correctly, and their refusal was error. The instruction, actually given by the court to the jury at the request of the jury, made an announcement, which was to some extent in conflict with the doctrine thus embodied in appellant's refused instruction.

In Bank of the Metropolis v. New England Bank, 1 How. 234, it appeared that there had been for several years mutual and extensive dealings between the Bank of the Metropolis and the Commonwealth Bank, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protests, postage, etc.; that accounts were regularly transmitted from the one to the other and settled upon these principles, and that the paper transmitted always appeared upon its face to be the property of the respective banks and to be remitted by each of them upon its own account; and it was there held that there was a lien for a general balance of account upon the paper thus

transmitted, no matter who might be its real owner, the supreme court of the United States there saying: "If the notes remitted had been the property of the Commonwealth Bank, there would be no doubt of the right to retain; because it has been long settled, that wherever a banker has advanced money to another, he has a lien on all the paper securities, which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement. The paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection without any consideration, and as its agent in the ordinary course of business, it being usual, and indeed necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was prima facie evidence that it was the property of the last-mentioned bank; and without notice to the contrary, the plaintiff in error had [97] a right so to treat it, and was under no obligation to inquire whether it was held as an agent or as owner; and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed. We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."

In Russell v. Hadduck, 3 Gilm. 233, 44 Am. Dec. 693, this court referred to the case of Bank of the Metropolis v. New England Bank, 1 How. 234, stated its facts and indorsed its doctrine, quoting from it the statement therein made that there is no difference in principle between an advance of money and a balance suffered to remain upon the faith of the mutual dealings there referred to, inasmuch as in the one case as well as in the other, credit was given upon the paper deposited or expected to be transmitted in the usual course of transactions between the parties.

In Bank of the Metropolis v. New England Bank, 6 How. 227, the same case again came before the supreme court of the United States, and the second opinion, as well as the first, was delivered by Mr. Chief Justice Taney, who summarized the doctrine previously announced by him in certain instructions which, as it was therein declared, should have been

given by the lower court to the jury. Those instructions were as follows: "If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank. And [98] if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks. But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank."

The same doctrine has been announced by the supreme court of Massachusetts in the case of Wood v. Boylston Nat. Bank, 129 Mass. 359, 37 Am. Rep. 366, where the case of Bank of the Metropolis v. New England Bank, 6 How. 227, is referred to, and the case of Lawrence v. Stonington Bank, 6 Conn. 521, is distinguished from such cases as the case there in hand, and here at bar. It appears that in the Connecticut case, the bank to whom the draft was sent for collection had notice that it was held for collection merely, and knew of the failure of the remitting bank before the draft was paid.

In Morris v. Preston, 93 Ill. 215, this court said (page 221): "With all such paper possession is evidence of ownership, and the commercial value of such paper would be greatly impaired and its negotiability would be destroyed, if the taker was required to investigate the title and to [99] seek for latent

equities before receiving it. But the law has imposed no such burden upon him until he has notice, or knowledge of facts which on inquiry would lead to notice. Appellant, when she placed the notes thus indorsed in the hands of Durham, thereby empowered him to sell and pass the title, however much he may have disregarded his duty or her instructions. Nor would the purchaser be required to see that he paid to her the proceeds, nor could he, when he was wholly uninformed of her rights, or that she had any, even the slightest, claim. She had invested Durham with what appeared to the commercial world an absolute title, with nothing to excite suspicion or to demand inquiry. Having done so, and he having abused his trust by pledging the notes for his own purposes in disregard of her rights, she must suffer the loss. He had the power, by being thus invested with evidence of title, to deal with the paper with all persons not having notice, precisely as though it was his own, and appellant cannot look to appellees to make good the loss occasioned by his bad faith, or the abuse of trust by her agent. It is, no doubt, a great hardship that she should sustain the loss, but she, by misplaced confidence, empowered her agent to wrong either her or others, and as one or the other must suffer the loss, she having placed it in Durham's power to perpetrate the fraud, it must fall on her."

Again, in the recent case of Doppelt v. National Bank of the Republic, 175 Ill. 432, 51 N. E. 753, this court held that a blank indorsement of a check by the payee transfers a good title to the holder, free from all equities in the payee's favor; and that a bank receiving from another bank a check indorsed in blank by the payee, is authorized to collect the check, credit the proceeds to the forwarding bank, and honor its drafts against the credit; and the payee cannot, upon the insolvency of the forwarding bank, recover from the bank which made the collection, without proof that the latter had notice that the forwarding [100] bank received the check merely as the payee's agent for collection; and it was there said: "Under the pleadings it became incumbent on appellant to show that he deposited these checks with Kopperl for collection only. He indorsed them in blank, without any restrictions whatever, and, under the well-settled rule of this state, he thereby transferred a good title to Kopperl, free from all equities in his favor. Under these circumstances, appellee could not know that he claimed or pretended to any

rights in the paper, and it was authorized to act upon Kopperl's indorsement of the checks, and proceed to collect the same and credit his account with the proceeds."

Cases in New York are referred to which hold the contrary of the doctrine here announced: McBride v. Farmers' Bank, 26 N. Y. 450. But it is to be noted that the courts in the state of New York have refused to follow the doctrine laid down by the supreme court of the United States in Bank of the Metropolis v. New England Bank, 6 How. 227, while the supreme court of this state has adopted the doctrine of the United States supreme court upon this subject.

The instructions, asked by appellant and refused by the court, required the jury to find from the evidence that the appellant applied the proceeds of the collection of the draft in controversy to the payment of the overdraft before it had any notice of the insolvency of the South Side Savings Bank of Milwaukee, as well as before it had any notice that the South Side Savings Bank received the draft as agent and for collection only. This feature of the refused instructions was correct under the doctrine laid down by the supreme court of the United States in Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 58, 13 Sup. Ct. Rep. 535, where the court, speaking through Mr. Justice Brewer, say: "We also agree with the circuit court (39 Fed. 684) in its conclusions as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections [101] had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity, and the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents; it was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal—the plaintiff."

For the errors above indicated, the judgment of the appellate court and the judgment of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

Boggs and Hand, JJ., dissenting.

Banking.—The duties of banks acting as collection agents are considered in the monographic note to Minneapolis etc. Co. v. Metropolitan Bank, 77 Am. St. Rep. 613-629. When a bank does not take title to money deposited with or collected by it, and the right to recover such money upon the insolvency of the bank, is the subject of an extended note to Piano Mfg. Co. v. Auld, 86 Am. St. Rep. 775-807.

SHERWOOD v. ILLINOIS TRUST AND SAVINGS BANK.

[195 Ill. 112, 62 N. E. 835.]

CORPORATIONS — EVIDENCE OF OWNERSHIP OF STOCK.—The appearance of a name on the books of a corporation as a stockholder is prima facie evidence that the holder of such name is the owner of the stock. (p. 187.)

CORPORATIONS—STOCKHOLDERS, WHO ARE—RIGHTS OF CREDITORS.—A creditor of an insolvent corporation is entitled to hold him liable as a stockholder who appears to be such upon the books. (pp. 187, 188.)

CORPORATIONS—TRUSTEE'S LIABILITY AS STOCKHOLDER.—One who stands upon the books of a corporation as a stockholder may be proceeded against to enforce the personal liability of stockholders for the debts of the corporation, although he in fact holds such stock as trustee. (p. 188.)

CORPORATIONS—TRUSTEE'S LIABILITY AS STOCKHOLDER.—One desiring to claim statutory protection exempting from liability as stockholder person holding stock as trustee or in a fiduciary relation must cause his representative character and the identity of the true owner to appear upon the records of the corporation. (p. 189.)

APPELLATE PRACTICE—APPEAL BONDS.—If, on an appeal, no order is made requiring an appeal bond, and no motion is made requiring such bond, the appellant must be deemed to have waived the filing of such bond, and cannot insist upon a motion to dismiss the appeal in the supreme court. (p. 190.)

J. S. Stevens, for the appellant.

Walker & Payne, for the appellee.

112 RICKS, J. This is an adjunct to and a part of an original case begun by bill in chancery in the circuit court of Cook county, on January 19, 1891, by Charles F. Morse, a judgment creditor of the Pacific Railway Company, a corporation organized under the laws of the state of Illinois, for the purpose of owning and operating certain street railways in Los Angeles, California, against said company and its stockholders to enforce the statutory liability of said stockholders for any unpaid balances on their stock. The original suit was brought

to this court and decree here entered finding that the holders of the stock of said corporation were liable to the extent of sixty-eight dollars per share to the creditors of such corporation, and directing a reference and accounting for the purpose of determining the liability of the various stockholders: Sprague v. National Bank of America, 172 Ill. 149, 64 Am. St. Rep. 17, 50 N. E. 19. The cause having been remanded to the circuit court of Cook county, and having been referred to the master, he made a report with reference to the persons holding said stock, and the shares held by each, and the extent of their liability. In so far as the finding and holding affected the plaintiff in error it was as follows:

114 "I find from the evidence that on or about October 21, 1889, the Pacific Railway Company issued to the defendant, F. B. Sherwood, one hundred and fifty shares of its capital stock of the par value of one hundred dollars a share, as per certificate No. 154 in evidence; that prior thereto W. W. Sherwood, a resident of the state of California, and a brother of the said F. B. Sherwood, purchased one hundred and fifty shares of the capital stock of the Los Angeles Cable Railway Company of the par value of one hundred dollars a share, as per certificate No. 285, in evidence; that said W. W. Sherwood, through his brother, F. B. Sherwood, borrowed upon said last-mentioned stock four thousand five hundred dollars from J. R. Winterbotham; that upon the organization of the Pacific Railway Company said F. B. Sherwood, under instructions of his brother, W. W. Sherwood, exchanged said Los Angeles Cable Railway stock for said one hundred and fifty shares of Pacific Railway Company stock, and had said stock issued and delivered to him, the said F. B. Sherwood, by that name, instead of to W. W. Sherwood, at the request of the latter and of said Winterbotham; that said certificate No. 154 was duly assigned to said Winterbotham and held by him until the said loan of four thousand five hundred dollars was paid, when it was returned to the said F. B. Sherwood, who has since retained the same; that said F. B. Sherwood acted for his said brother in the purchase of the said one hundred and fifty shares of stock of the Los Angeles Cable Railway Company. It is contended by F. B. Sherwood that he holds the one hundred and fifty shares of Pacific Railway Company stock as trustee for his said brother, and that he is a trustee within the meaning of section 23, chapter 32 of the statutes in force July 1, 1872, and therefore cannot be charged as a stock-

holder, and has no funds in his hands to be charged with the said liability. My conclusion is, that while it is true, from the evidence, that as between the said Sherwoods, F. B. Sherwood holds said stock in trust for W. W. Sherwood, yet said stock was not issued to F. B. Sherwood as a trustee [115] nor impressed with any visible marks of a trust; that he is not a trustee within the meaning or spirit of said section 23 of chapter 32 above referred to; that so far as creditors are concerned he is an absolute stockholder, and cannot be permitted to set up a private and secret trust that may exist between him and his brother, to defeat his liability as a stockholder in this cause in favor of the creditors of said company. I therefore conclude that F. B. Sherwood is liable upon said one hundred and fifty shares of Pacific Railway Company stock in the sum of sixty-eight dollars a share, making his total indebtedness thereon the sum of ten thousand two hundred dollars."

To this report of the master, plaintiff in error filed exceptions before the chancellor, and he sustained the exceptions and found that plaintiff in error was not liable under the facts so found by the master. The receiver prosecuted an appeal to the appellate court for the first district, where the decree of the circuit court was reversed and a formal decree entered in the appellate court decreeing that plaintiff in error pay ten thousand two hundred dollars, with interest thereon from August 1, 1898, at the rate of five per cent per annum, for the benefit of the creditors of said corporation, which had been declared insolvent and the indebtedness of which amounted to one million three hundred thousand dollars: Morse v. Pacific Ry. Co., 93 Ill. App. 33. From this decree of the appellate court plaintiff in error prosecutes this writ, and for grounds of error insists that the appellate court erred in reversing the judgment of the circuit court and not affirming the same, and in entering judgment against plaintiff in error, and that the appellate court had no jurisdiction to make any order or decree in said cause, because the appellant there, the defendant in error here, neither gave nor was it required to give bond for such appeal.

The appellate court made no special finding of the facts different from those found by the circuit court, and in their opinion say: "Appellee Sherwood does not in his [116] exceptions, neither do the appellants in their assignment of errors, make any objection to or in any wise criticise the finding of

facts reported by the master. We therefore accept such finding of facts as correct, ... with the conclusions thereon of the master."

The contention of the plaintiff in error is, that the evidence shows that he was merely a holder of the stock upon which he is assessed, as trustee for W. W. Sherwood, his brother, and that by section 23 of chapter 32 (Hurd's Stats. 1889, p. 437), he was specifically exempt from personal liability. The section of the statute relied upon is as follows: "No person holding stock in any corporation as executor, administrator, conservator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, conservator, guardian, or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been if he had been living and had been competent to act, and held the stock in his own name."

The evidence in this record clearly establishes that, in so far as the Pacific Railway Company is concerned, W. W. Sherwood was never known to it in any way in connection with this stock. This company was organized in August, 1889. The certificate representing the shares in question was issued to plaintiff in error on the twenty-first day of October, 1889, the body of which certificate is as follows: "This is to certify that F. B. Sherwood is the owner of one hundred and fifty shares of the capital stock of the Pacific Railway Company, amounting to fifteen thousand dollars. This stock is transferable only on the books of the company, in person or by attorney, on the surrender [117] of this certificate. This stock is full paid and nonassessable." W. W. Sherwood's name does not, and never did, so far as the evidence discloses, appear upon the books of this company or upon this certificate of stock, nor did any words or indorsement appear upon the stock or the books of the company that would serve as notice to the company or any person that the ownership of F. B. Sherwood was in any sense a qualified or limited ownership, nor was there anything, either from the certificate or the books of the company, that was calculated to put any person upon inquiry as to the ownership of such stock. The interest, if any, of W. W. Sher-

wood in this stock arose by virtue of the agreement between him and plaintiff in error, which, in so far as it relates to the public or the Pacific Railway Company, was a secret one, or it was a resulting interest arising from the fact that W. W. Sherwood was the owner of the stock of the Los Angeles Cable Company that was exchanged for this stock. The Los Angeles stock so exchanged, however, was transferred to plaintiff in error before the exchange for the stock in question was made, so that it is perfectly apparent from the evidence relating to this transaction that neither the Pacific Railway Company nor its creditors could have had any knowledge that W. W. Sherwood had any interest in this stock, or bore any relation whatever to the company issuing it. To all intents and purposes the plaintiff in error was the legal holder and owner of this stock.

The statute (chapter 32, section 8) makes the assignor of stock not fully paid for liable to the creditors of the company for the debts of the corporation, and also makes every assignee and transferee liable for the amount unpaid thereon. It requires that such assignment of stock upon which a portion is unpaid be entered of record in the recorder's office. It is clear from this evidence that this requirement was not observed, and it seems equally clear that it would be difficult for the creditors of the [118] corporation to fasten liability upon W. W. Sherwood, as assignor or original owner of the stock, with nothing in the records of the corporation or upon the stock certificate to indicate anything other than an absolute ownership of F. B. Sherwood.

While, it may be, sufficient appears in this evidence to establish a trust relation between F. B. Sherwood and W. W. Sherwood in an equitable proceeding between them, or wherein the creditors of W. W. Sherwood were seeking to subject his property to the payment of his debts, it does not seem that such relation should be sufficient to bring plaintiff in error within the exemption claimed under section 23 of the statute. The appearance of the name of plaintiff in error on the books of the corporation as a stockholder was prima facie evidence that he was the owner of the stock: Holland v. Duluth Iron etc. Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50. The issuance of a certificate is not necessary: Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68; Cartwright v. Dickinson, 88 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. 1030. A creditor is entitled to hold him liable as a

stockholder who appears to be the legal owner of the stock; and this is true, although it may be that there has been a transfer of the stock which has not been entered upon the books of the corporation: Thompson on Liability of Stockholders, sec. 178; 2 Morawetz on Corporations, sec. 852. On the same principle, one who stands upon the books of the corporation as a stockholder may be proceeded against for the recovery of any sum upon the stock, although he in fact holds such stock as a trustee for another: Thompson on Liability of Stockholders, sec. 179; 2 Morawetz on Corporations, sec. 852. In the case at bar, the case is made still stronger by the fact that the books have shown plaintiff in error to be a stockholder, and that the stock itself is issued to him directly, without any qualifications of ownership, and in such case the above rule prevails in actions to enforce the personal liability of stockholders for the debts of the corporation under statutory provisions: [119] National Bank v. Case, 99 U. S. 631; Wheelock v. Kost, 77 Ill. 296; Hale v. Walker, 31 Iowa, 344, 7 Am. Rep. 137; Magruder v. Colston, 44 Md. 349, 22 Am. St. Rep. 47; Cook on Stock and Stockholders, sec. 245; Winston v. Dorsett Pipe etc. Co., 129 Ill. 64, 21 N. E. 514; Kerr v. Urie, 86 Md. 72, 63 Am. St. Rep. 493, 37 Atl. 789; 1 Parsons on Contracts, 8th ed., 122; Ollesheimer v. Thompson Mfg. Co., 44 Mo. App. 173; Thompson on Corporations, secs. 3192, 3194, 3197.

We have found the reason of the rule no better stated than in Kerr v. Urie, 86 Md. 172, 63 Am. St. Rep. 493, 37 Atl. 789, where it is said: "If persons were allowed to subscribe for stock in a national bank, or in any other corporation where a personal liability attaches, either as attorney for an unnamed principal, cestui que trust, or as an attorney for an unnamed infant of tender years, and when called upon to pay the debts of the bank to the extent of the stock so subscribed could escape by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations, which are found in great numbers in every state, would be deprived of the only certain means provided by law for the payment of their claims. The only safe rule on this subject is, that when stock is held in a representative capacity it should be noted on the stock-book of the bank, and if a person appears there as absolute owner of the stock he will not generally be permitted to deny it. If he claims to be trustee

and does not disclose it, he is guilty of laches, for which others should not suffer."

To the authorities above cited many could be added, and we are disposed to hold that one who desires to claim the benefit of the exemption provided by our statute for the benefit of trustees, administrators, executors, and other persons holding fiduciary relations, when dealing in stocks of corporations in this state, should protect himself, and the creditors of such corporations alike, by causing his representative character and the identity of [120] the true owner to appear upon the records of such corporation. Any other rule will enable persons to buy the stocks of such corporations and speculate upon the chances, and if the venture is prosperous they will doubtless hold their stock, and if it is a failure they are likely to clothe themselves in the legal garb of a trustee whose cestui que trust is a minor or a nonresident, and in most instances whose financial condition is such that any decree entered by the court will be no injury to him or benefit to the creditors of such corporation.

Pauly v. State Loan etc. Co., 165 U. S. 606, 17 Sup. Ct. Rep. 465, is the only case cited by plaintiff in error in support of his contention, but in that case the holder of the stock was a pledgee, and his relation to it expressly so appeared upon the books of the bank. Section 5152 of the federal statute was very similar to section 23 of chapter 32 of our statutes. In passing upon the question, after a review of many of the cases theretofore decided by the same court, the court say: "The present case differs from those cited in the important particular that the stock list of the bank gave information to all who examined it that the State Loan and Trust Company was not the real or absolute owner of the shares in question, but held them only as 'pledgee'; that there was no out-and-out transfer of the stock, whereby the transferrer, as between him and the transferee, parted with his interest, and that the real ownership remained with the pledgor, the pledgee acquiring only a lien upon the stock to secure its debt." In that case, several cases are cited and quoted bearing great similarity to the case at bar, in which that court had held the legal and apparent owner of the stock liable.

The only remaining contention is, that inasmuch as no appeal bond was filed at the time the case was taken from the circuit to the appellate court, that court acquired no jurisdiction of the case, and that its judgment is a mere nullity.

Plaintiff in error cites in support of this position section 67 of the practice act, which provides [121] that the bond shall be given within such time, not less than twenty days, as shall be limited by the court, and filed in the office of the clerk of the court from which the appeal is prayed, in such sum as the court may fix, with sureties to be approved by the court, etc., and which section says that the bond is "to secure the adverse party." He also cites note 5, on page 1000, of volume 1 of the Encyclopedia of Pleading and Practice. The weight of the authorities cited in that note are to the effect that all technical steps in appellate procedure (among which is the giving of the bond), pertaining merely to bringing up the case, may be waived, and the reason assigned is, that they are ordinarily held intended purely for the appellee's benefit. The only state supporting his contention is Massachusetts. The rule is there further stated that "a general appearance, as by joinder in error in or an agreement to submit the cause on briefs or oral arguments, is a sufficient waiver." In this case, no order of court was made requiring bond, and no motion was made to dismiss the appeal in the appellate court for want of bond, nor was the attention of the court in any manner called to the absence of such bond, or any request on the part of the plaintiff in error that the appellant there should be required to give a bond. The first complaint, so far as the record discloses, made on the part of the plaintiff in error of the want of a bond is in this court upon this writ of error. We think the complaint comes too late. The appeal bond was for his benefit, and was such a matter as he could waive, and the plaintiff in error must be held to have waived a provision that the statute says was for his benefit, and to which he gave no attention until after a judgment adverse to him had been entered.

The decree of the appellate court is affirmed.

Corporate Stock—Evidence of Ownership.—If the name of a person appears on the stock-book of a corporation as a stockholder, this is prima facie evidence that he is owner of the stock: Holland v. Duluth Iron etc. Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265. See, also, In re Argus Printing Co., 1 N. Dak. 435, 26 Am. St. Rep. 639, 48 N. W. 347; Zang v. Wyant, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; Commonwealth v. Dalzell, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535; monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 832, 857. If, upon the books of a national banking corporation, one appears to be the owner of

stock therein, he cannot escape liability by proving that he held it as trustee for some other person, whose name and interests do not appear from such books: Kerr v. Urie, 86 Md. 72, 63 Am. St. Rep. 493, 37 Atl. 689.

KELLYVILLE COAL COMPANY v. PETRAYTIS.

[195 Ill. 215, 63 N. E. 94.]

ALIENS—RIGHT TO SUE.—A nonresident alien mother of a minor killed by the negligence of another may maintain an action against the wrongdoer to recover for the death. (p. 192.)

D. D. Evans and G. M. McDowell, for the appellant.

G. P. Buckingham, for the appellee.

215 WILKIN, C. J. This is an appeal from a judgment of the appellate court for the third district affirming a judgment rendered against the Kellyville Coal Company, in favor of appellee, Mariyona Petraytis, in the circuit court of Vermilion county, for causing the death of her son, Antone Petraytis. The deceased was employed in the coal mine of appellant, and was killed by the falling of a large rock from the roof of the room in which he was working. The declaration charges a willful violation of, and a willful failure to comply with, the provisions of the statute relative to miners, by the coal company, in not delivering timbers for props, etc., at the usual place when demanded, and in not having its mine examined, as provided in sections 16 and 18 of "An act to revise the laws 216 in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein," approved April 18, 1899, in force July 1, 1899: Hurd's Stats. 1899, c. 93, p. 1157. It is averred that decedent was killed by reason of such violation and failure, and that appellee is his mother, and was solely dependent upon him for support. To the declaration the plea of not guilty was interposed. Upon the issues thus joined the case was tried. At the close of the plaintiff's evidence, counsel for appellant moved that the jury be instructed to find the defendant not guilty, one of the reasons assigned being, that the evidence disclosed the fact that the plaintiff was a resident of Lithuania, under the sovereignty of Russia, and therefore incapable of maintaining her suit. The motion was denied, and the trial proceeded. The motion to instruct the jury to

return a verdict for the defendant was renewed at the close of all the evidence, and again denied. The jury returned a verdict in favor of the plaintiff for sixteen hundred and fifty dollars. The appellate court has affirmed the judgment rendered upon that verdict, and the cause is brought here upon further appeal.

The only question of law before this court now urged as a ground for reversing the judgment below is, that the plaintiff could not maintain this action by reason of her being a nonresident alien. It is contended by counsel for appellee that the record does not clearly show appellee to be a nonresident alien, and it is said the burden of proving that fact is upon appellant. But under our view of this case, it may be conceded appellee was, at the time of bringing this suit, a nonresident alien, our opinion being that such fact does not disqualify her from maintaining her action. The statute in question (section 33) provides that for any injury to person or property occasioned by any willful violation of the act or willful failure to comply with any of its provisions, a right of action shall accrue "to the party injured, for any direct damages [217] sustained thereby, and in case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life," etc. The language used does not except nonresidents nor preclude them from the right to sue under its provisions.

In the case of Mulhall v. Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, a case, in fact and principle, much like the one at bar, where this identical question was raised, it was held that a mother who had never been a resident of the state of Massachusetts, and who was a citizen and resident of Ireland, was entitled to recover in the courts of Massachusetts for negligently causing the death of her son. In that case, it is said: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens: Deni v. Pennsylvania R. R. Co., 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558; Brannigan v. Union Gold Min. Co., 93 Fed. 164. But compare Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200. On the other hand, in several

states the right of the nonresident to sue is treated as too clear to need extended argument: Philpott v. Missouri Pacific R. R. Co., 85 Mo. 164; Chesapeake etc. R. R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47; Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 409; Luke v. Calhoun County, 52 Ala. 115. In all cases the statute has the interest of the employés in mind. It is on their account that an action is given to the widow or next of kin. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount [218] of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

Counsel for the appellant rely chiefly upon the case of Deni v. Pennsylvania R. R. Co., 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558, as supporting a contrary doctrine; but the same court had previously held in the case of Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200: "As a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit in Pennsylvania." This doctrine is not qualified or overruled in the Deni case, and it would therefore seem that the Pennsylvania cases are not in harmony on the subject. It may be said here that neither citizenship nor residence is requisite to entitle a person to sue in the courts of Illinois. That right is certainly not questioned when sought to be exercised here by citizens of other states, and we perceive no reason why it should be granted to citizens of other states of the Union, but denied to persons living in foreign countries. We are inclined to think that the authorities cited and relied upon for the holding in Mulhall v. Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, are more in accordance with reason and justice.

Though not directly raised as a question for our decision, it is inferentially insisted that the evidence fails to show that appellant acted or failed to act willfully, and that the plaintiff was dependent upon decedent for her support. From an examination of the record, it cannot be said there is no evidence whatever supporting these contentions, but, on the other hand, we find evidence tending to show a contrary state of facts, and hence the trial and appellate courts have found adversely to appellant upon all such questions of fact.

The judgment of the circuit court will be affirmed.

Wrongful Death.—A Nonresident Alien mother may recover in the courts of Massachusetts for the wrongful death of her son: Mulhall v. Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 886. Compare Deni v. Pennsylvania R. R. Co., 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558. See, further, the notes to Attrill v. Huntington, 14 Am. St. Rep. 353, 354; Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 869-885.

MUELLER v. NORTHWESTERN UNIVERSITY.

[195 Ill. 236, 63 N. E. 110.]

CONTRACTS—RIGHT TO PROHIBIT ASSIGNMENT OF.—The parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him. (p. 195.)

CONTRACTS—CONSTRUCTION.—If the construction of a contract in writing is doubtful, and the parties thereto have given a construction to it by acting upon it in a certain manner, courts usually adopt that construction. (p. 199.)

INTEREST.—COMPLAINANT IN A BILL OF INTERPLEADER cannot be charged interest when the defendants claim the fund and it is withheld at the request of one of the defendants, and the complainant is not guilty of negligence causing the delay in payment. (p. 201.)

Newman, Northrup & Levinson, for the appellant.

Follansbee & Follansbee, for the appellee.

248 HAND, J. It is first contended, the assignment to Mueller being in express violation of the terms of the contract, as against the university the assignment is void, and that Mueller is entitled to no relief by virtue of said assignment, as against the university, even in a court of equity. The contract between the university and Sammis in express terms provides that the contractor shall not sell, 249 assign, transfer, or set over said contract, or any part thereof, or interest therein, unto any person or persons whomsoever, without the consent, in writing, of the architects previously had and obtained thereto, and that an assignment or transfer of the contract without the written consent of the architects first had and obtained thereto shall be absolutely null and void; and no claim is made that the architects or the university consented, in writing, to the assignment made by Sammis to Mueller. The assignment relied upon not having been assented to, in writing, by the architects or the university, is such

assignment null and void as to the university? The rule is laid down in volume 2 of the American and English Encyclopedia of Law (second edition, page 1035), that the parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him, and the rule thus announced is well supported by the authorities.

In Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379, 8 Sup. Ct. Rep. 1308, the court say: "At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterward done by him or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'"

In Delaware County v. Diebold Safe and Lock Co., 133 U. S. 473, 10 Sup. Ct. Rep. 399, it is said: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which [250] manifests the intention of the parties that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."

In Burck v. Taylor, 152 U. S. 635, 14 Sup. Ct. Rep. 696, the state of Texas made a contract with Schnell for the erection of its capitol building in accordance with certain plans and specifications, Schnell to furnish all the labor and do all the work for the consideration of the conveyance to him by the state of three million acres of land. The contract contained the following clause: "It is further agreed, covenanted, and stipulated by the party of the second part, that this contract shall not be assigned, in whole or in part, by the party

of the second part without the consent, in writing, of the party of the first part, signed by the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments." In a suit between assignees, it was held: "It is true that in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the state, and his promise was, not to assign the contract, in whole or in part, without the consent, in writing, of the state authorities. It was a promise which entered into and became one of the terms of the contract, and one which was binding not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to [231] secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up, during or after the completion of the contract, in favor of parties of whose interests in the contract it had no previous knowledge and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him. It is unnecessary to hold that the contractor might not be personally bound upon his promise, made before the performance of the contract, to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise, it would be an independent promise on his part and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay, the contract remaining all the time the property of the contractor, subject to disposal by and with the consent of the state. To him alone the state would remain under obligations and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with

the contractor, paying to him the whole consideration and receiving from him a full release."

In City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859, the contract was between the city and the Metropolitan Street Lighting Company for the lighting by the company of certain streets, and contained this clause: "It is further agreed between the parties hereto that the party of the second part shall not assign this contract without first obtaining the consent of the first party, indorsed hereon in writing." The Standard Oil Company furnished the [252] lighting company the oil necessary to enable it to perform its contract with the city, and also loaned it considerable money, and the lighting company assigned to the oil company, as security, the money due under the former's contract for the month of October, 1892. The Standard Oil Company sued the city and recovered judgment, which was reversed on appeal. In disposing of the case the court say: "The inhibition, it will be noticed, is not alone upon the assignment of the obligation to light the streets, but upon the assignment of the contract. What was the contract between the parties? Certainly one of its important elements was the duty laid upon the city to make monthly payments to the lighting company for the services rendered, and another was the correlative right of the company to receive such payments. The assignment of the October installment, if valid, not only transferred to the plaintiff a right secured to the lighting company by the contract, but affected, as well, an important obligation on the part of the city. It compelled the city to deal with strangers, and to determine, at its peril, which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city and against which it sought to provide by making the contract nonassignable. Another object in view might have been to prevent the company from losing interest in the performance of the contract by devesting itself of all beneficial interest therein. But it is needless for us to speculate on the motives for the city's action. It is enough for us to know, whatever its reasons may have been, that it has in plain language stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms."

In La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42, which was an action for damages for the breach of a contract [253] to buy grapes, the court, after discussing the California statute providing for the assignment of written contracts for the payment of money or delivery of personal property, say: "In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides, in terms, that it is not transferable, it certainly cannot be transferred, although it otherwise might be so. Leases, and the tickets usually issued by railroad companies, are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet if there are equivalent expressions, or language which excludes the idea of performance by another, it is not assignable. Of this character is the case of Shultz v. Johnson, 5 B. Mon. 497, which is much relied upon for the appellant. There the defendant agreed to buy from one Johnson successive crops of hemp 'of his own raising,' and it was held that the defendant could not be compelled to accept hemp raised by Johnson's administrator. The court said that 'the question in every case must turn at last upon the intention of the parties,' and that the phrase 'of his own raising' meant that the hemp was to be raised by him or under his personal superintendence and direction."

If we assume, however, that the assignment of December 4, 1896, was valid, what is the legal effect thereof? We do not understand the appellant to contend that the assignment transferred to Mueller the contract in such manner that he had the right or could have been compelled to carry out the contract in all its terms, but that his position is that the assignment gave him the right to receive from the university the money to become due under the contract, as the same should accrue and be earned by Sammis—in other words, that it was not an assignment of the contract, but only an assignment of the money which might thereafter accrue and become due thereon. The assignment was clearly not a transfer of all [254] of the money that was to accrue and become due thereafter upon the contract, as a considerable portion thereof was expressly reserved in the assignment by Sammis with which to pay materialmen, subcontractors, and laborers, outside of Mueller. It was therefore, at most, only an assignment, in part, of the money which was to accrue and become due upon

the contract thereafter. How was it to be determined what portion of the money had and what portion had not been assigned to Mueller? The assignment is silent upon that point. The work had not been commenced and nothing was due upon the contract at the time of the execution of the assignment. No method is pointed out therein whereby the amount that is going to Mueller or the amount that is to be retained by Sammis can be determined, and no provision is made in the assignment, in express terms, that Mueller is to collect and disburse the money as it accrued and became due. Sammis had the right to collect the money from the university, under the contract, prior to the time the assignment was made, and as he did not transfer, by the assignment, that right to Mueller, it remained in him. The assignment was prepared by the attorney of Mueller and must be taken most strongly against Mueller. If it had been intended that Mueller should collect the money directly from the university, the assignment would have certainly given him that power in express terms. We think, therefore, upon the face of the assignment alone, Sammis had the right to collect the money from the university as it accrued and became due, and to pay the materialmen, subcontractors, and laborers, other than Mueller, out of the amount collected, and that the only right that Mueller acquired by virtue of the assignment was to receive the balance from Sammis remaining in his hands from the amounts collected by him from the university after he had paid the materialmen, subcontractors, and laborers provided to be paid by the assignment. This construction is the one put upon the assignment [255] by the parties themselves, as shown by their course of business and the correspondence of Mueller found in this record. Where the construction of an instrument in writing is doubtful, and the parties thereto have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties. Neither is this construction a strained or unnatural one. The assignment was intended only as a security. At the time and for many months after the assignment was executed, Mueller had confidence in Sammis. Sammis was in Chicago where the work was being done, where the architects' certificates would be issued and the money paid, while Mueller was in Cincinnati. Sammis could readily collect the money, pay the local claims and remit the balance to Mueller. This could not

be done by Mueller without going to Chicago. Up to about the time the building was completed, Mueller undoubtedly believed Sammis would carry out the assignment in good faith and turn over to him what remained in his hands after the payment of the claims provided to be paid to parties other than Mueller by the terms of the assignment, and made no effort to collect the same himself. If the assignment is to be so construed—and we are fully convinced such is the correct construction thereof—then the sums paid to Sammis by the university were rightfully paid to him, and the fact that he subsequently violated his trust and refused to account to Mueller will not authorize Mueller to collect the money a second time from the university and after it has rightfully been paid to Sammis. In any event, we think the evidence clearly shows that there was an understanding between Mueller and Sammis that Sammis should collect from the university the money on said contract as it became due and payable, and after paying the materialmen, subcontractors, and laborers in Chicago therefrom, turn over the balance to Mueller. Whether they reached such understanding from [256] the terms of the assignment or by virtue of a subsequent parol agreement, as testified to by Sammis, is wholly immaterial. That Sammis collected the money due upon said contract from the university with Mueller's consent we have no question.

The appellant urges that the provision in the contract that it shall not be assigned "without the consent, in writing, of the architects previously had and obtained thereto," was waived, and that by the conduct of the university and its agents it has estopped itself to insist that the assignment is null and void. We have no question that such provision, being for the benefit of the university, could be waived by it or that by its conduct it might estop itself from insisting thereon. We, however, find nothing in this record which can be construed into a waiver of such provision or into an estoppel as against the university, so as to make it liable to pay to Mueller more than the balance found to be due upon the contract with Sammis. The notice to D. H. Burnham & Co. of the assignment, contained in Mueller's letter of December 11, 1896, is vague and uncertain, and gave them but little information as to the transaction between Mueller and Sammis. If, however, they had followed up such notice and made inquiry of Mueller and Sammis—the only parties who knew what the real arrangement between Mueller and Sammis was—all they would have

learned would have been the fact that Sammis retained the right to receive the money from the university upon the contract as it accrued and became due, and that he was to account to Mueller for the balance remaining in his hands after the materialmen, subcontractors, and laborers in Chicago had been paid. Such information would not have made the university an insurer that Sammis would carry out such arrangement in good faith with Mueller, or made it liable to Mueller in case Sammis converted to his own use such balance instead of paying the same to Mueller, or estopped it from showing, in defense of this cross-bill, [257] that it paid to Sammis the various sums which he received under said contract, and that he had the right to receive the same.

It is claimed the university should have been required to pay interest on the balance due Sammis. It withheld the balance at the request of Mueller. The amount so withheld was claimed by each of the defendants to the bill of interpleader. The delay in payment, if any, was caused thereby, and through no fault of the university. There was no unreasonable and vexatious delay of payment on its part, and it should not be required to pay interest on said balance.

We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed.

POWERS OF PARTIES TO AN ASSIGNABLE CONTRACT TO RESTRICT ITS ASSIGNABILITY.

I. Right to Restrict Assignability.

II. Effect of Assignment in Violation of Stipulation.
- a. Generally the Assignment is Void.
- b. Waiver of Right to Object to the Assignment.
- c. Right of Assignee as against Assignor.
- d. Restriction on Assignment, Who may not Insist on.
- e. Assignment as Collateral Security.

III. Involuntary Transfers.

I. Right to Restrict Assignability.

There can be no doubt that though a contract is in its nature assignable, the parties thereto may in terms restrict or prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him. Thus, in Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379, 8 Sup. Ct. Rep. 1308, the court said that, "at the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract,

whether by requiring something to be afterward done by him or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." And, in Delaware County v. Diebold Safe etc. Co., 133 U. S. 473, 10 Sup. Ct. Rep. 399, the court again said, that "a contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract including both his rights and his obligations cannot be assigned without the consent of the other party to the original contract." Broad language is used in Devlin v. Mayor, 63 N. Y. 8-17, 50 How. Pr. 1-9, where the court said that "parties may, in terms, prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But, when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications, may be assigned, and by them the personal representatives will be bound." This language was adopted and applied in Carter v. State, 8 S. Dak. 153, 65 N. W. 422.

In Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859, the court decided that a contract with a municipality for lighting its streets, containing a stipulation that the contractor should not assign such contract without first obtaining the consent of the city indorsed thereon in writing, is not assignable, either in whole or in part, and that money due or to become due thereunder, whether payable as an entirety or in installments, cannot be assigned without first obtaining such written consent. In reaching this determination the court, in the course of its remarks, said that "the inhibition, it will be noticed, is not alone upon the assignment of the obligation to light the streets, but upon the assignment of the contract. What was the contract between the parties? Certainly one of its important elements was the duty laid down upon the city to make monthly payments to the lighting company for the services rendered, and another was the correlative right of the company to receive such payments. The assignment of the October installment, if valid, not only transferred to the plaintiff a right secured to the lighting company by the contract, but affected, as well, an important obligation on the part of the city. It compelled the city to deal with strangers, and to determine, at its peril, which of the contesting claimants was entitled to the fund. This may have been

one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract nonassignable. Another object in view might have been to prevent the company from losing interest in the performance of the contract by devesting itself of all beneficial interest therein. But it is needless for us to speculate on the motives for the city's action. It is enough for us to know, whatever its reasons may have been, that it has in plain language stipulated against the assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, and not all, of the rights and obligations arising out of the contract would be, it seems to us, an inexcusable perversion of its terms": Omaha v. Standard Oil Co., 55 Neb. 340, 75 N. W. 859.

In La Rue v. Groesinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42, which was an action for damages for breach of a contract, the court, after discussing the effect of the statute on the assignment of written contracts, said: "In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it might otherwise be so. Leases and the tickets usually issued by railroad companies are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet, if there are equivalent expressions, or language which excludes the idea of performance by another, it is not assignable." Upon the same principle, it would probably be held that if the contract provided that it was not to be assigned to a particular person, it could not be assigned to such person, and it would seem, from one of the cases cited by the appellant, that if an intention not to deal with a particular person appears from circumstances outside the contract, it cannot be assigned to such person. In the case referred to, the plaintiff had previously been supplying the defendant with ice, but the latter had become dissatisfied and had transferred his custom to a company called the Citizens' Ice Company, and had made a contract with it. After this the plaintiff bought out the Citizens' Ice Company, and, without letting the defendant know of the transfer, went on supplying him with ice. When the defendant found out what had been done, he refused to pay for the ice, and the court held that he was not liable, although he had consumed the ice and had no fault to find with it: Boston Ice Co. v. Potter, 123 Mass. 30, 25 Am. Rep. 9.

In Burck v. Taylor, 152 U. S. 635, 14 Sup. Ct. Rep. 696, it appeared that the state of Texas made a contract with one Schnell for the erection of its capitol building in accordance with certain plans and specifications, Schnell to furnish all the labor and do all the work for the consideration of the conveyance to him by the state of three million acres of land. The contract contained the following clause: "It is further agreed, covenanted, and stipulated by the party of the second part that this contract shall not be as-

signed, in whole or in part, by the party of the second part without the consent in writing of the party of the first part, signed by the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of the departments." In a suit between assignees it was said by Mr. Justice Brewer: "It is true that, in the case at bar, we have no construction of a statute but only of the terms of a contract. That contract was, however, as binding on one party as on the other. The contractor assented to its terms precisely as did the state, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. It was a promise which entered into, and became a part of, the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights under it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other persons in the performance of the contract to secure the constant and sole service of the contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him. It is unnecessary to hold that the contractor might not be personally bound upon his promise made before the performance of the contract to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise, it would be an independent promise on his part, and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay, the contract remaining all the time the property of the contractor, subject to disposal by and with the consent of the state. To him alone the state would remain under obligation, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration and receiving from him a full release": Burck v. Taylor, 152 U. S. 649, 14 Sup. Ct. Rep. 696.

II. Effect of Assignment in Violation of Stipulation.

a. Generally the Assignment is Void.—It has been decided that an assignment of a contract, in express violation of its positive provisions, is void, and that the person claiming through such assignment is entitled to no relief in equity: Grigg v. Landis, 19 N. J. Eq.

850. On the other hand, a collateral covenant restraining the assignment of a contract cannot be enforced in equity, if it appears in the contract that such restraint is but an incident to the objects of the principal covenants which have been substantially performed: Grigg v. Landis, 21 N. J. Eq. 494.

b. **Waiver of Right to Object to the Assignment.**—The debtor or contractee under a contract may waive a provision therein forbidding its assignment without his consent: Brewster v. City of Hornellsville, 35 App. Div. 161, 54 N. Y. Supp. 904. Or he may act in such manner as to be estopped from raising objection to an assignment after the work has been performed under the contract. Thus, in a case involving the assignment of a contract for the erection of a schoolhouse for a city, the court said: "By the terms of the contract it was not assignable without the written consent of the city. The city might have refused to recognize the assignment, or to have any dealings with the assignee under it: Pike v. Waltham, 168 Mass. 581, 47 N. E. 437. Although no consent to the assignment was ever given in writing by the representatives of the city, the plaintiff went on under it without objection from the city, and completed the contract at his own expense, and the building was accepted by the city. He has received payments from the city on account of his work to the amount of ten thousand five hundred dollars, which were made by checks payable to the order of himself and his son, and were receipted for by their joint receipts. The city appeared in this suit and offered to pay the balance of four thousand dollars in its hands to such party as is equitably entitled thereto, and asked that the parties be required to interplead, and that the court order and decree to whom the payments should be made. Under these circumstances it is immaterial that the city did not consent to the assignment: James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; Richardson v. White, 167 Mass. 58, 44 N. E. 1072. Under the authority of these cases the plaintiff acquired equitable rights which entitled him to the money now in the possession of the city": Staples v. Somerville, 176 Mass. 241, 57 N. E. 380.

c. **Right of Assignee as Against Assignor.**—If, in such case, the contractee in no way assents to the assignment of the contract, which is done in contravention of its terms, all that is acquired by the assignee is a right to maintain an action against the assignor for the share of the profits which he has attempted to transfer: Burck v. Taylor, 152 U. S. 634, 14 Sup Ct. Rep. 696.

d. **Restriction on Assignment, Who May not Insist on.**—If a contract for the sale of real estate stipulates that no assignment of the premises shall be valid unless indorsed on the contract, and countersigned by the vendor, such provision is for the benefit of the vendor, who alone has the right to insist upon its enforcement or object that an assignment is void because the condition is not com-

plied with: Wilson v. Reuter, 29 Iowa, 176. A provision in a street grading contract to the effect it shall not be assigned, nor shall any of the money payable thereunder be assigned without the consent of the city in writing, and that in the absence of such consent, no right under the contract, nor to any money to grow due by its terms, shall be asserted against the city, is not available to a junior assignee of money due and to grow due under the contract, to attack the right of priority of a senior assignee of such money who has failed to procure the consent of the city to his assignment, in a case where the city has paid into court for distribution the money payable under the contract and no claim is made against the city. Such provision inserted in the contract is solely for the benefit of the city, which alone can object if its consent is not obtained to an assignment of the contract: Fortunato v. Patten, 147 N. Y. 277-281, 41 N. E. 572. And to the same effect is the case of Burnett v. Jersey City, 31 N. J. Eq. 341.

e. **Assignment as Collateral Security.**—A stipulation in a contract against its assignment is not violated by its assignment as collateral security. Thus, a provision in a contract for the sale of land that it shall not be assignable, and that the purchase money shall be payable to the vendor alone, is not violated by the vendor assigning the contract as collateral security, as the only effect of such provision is to prevent the title to the chose in action from passing to a third person so as to prevent the assertion of an equity or defense that might arise between the original parties: Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462. And a provision in a building contract that no interest therein shall be assigned without the consent of the trustees or the architect does not prevent its assignment as collateral security for money loaned to carry out the contract. Such provision is for the benefit of the contractee alone, and such assignment cannot be questioned by the creditors of the contractor: Board of Trustees v. Whalen, 17 Mont. 1, 41 Pac. 849.

III. Involuntary Transfers.

We cannot discover that the question has received sufficient consideration to warrant us in speaking with confidence that our views receive the support of the courts; still, we think that the general rule permitting the parties to stipulate against the assignment of their contracts must be restricted in its operation to transfers voluntarily made by them. Otherwise it would be possible for a party beneficially interested in a contract to hinder or defraud his creditors by consenting to a stipulation limiting or excluding its assignability. It has been held that a stipulation in a contract for the sale of real property that the purchaser will not assign it without the consent of the vendor concedes the alienable quality of the interest, and provides the personal covenant of the vendee against it, and that a sale under execution is not a breach of this covenant,

and the purchaser acquires the same interest as if a voluntary assignment had been made to him with the consent of the vendor: Freeman on Executions, sec. 194; Jackson v. Silvernail, 15 Johns. 278; Higgins v. McConnell, 130 N. Y. 482, 29 N. E. 978.

"It is undoubtedly true, as a legal proposition, that a defendant having no estate in property which he can transfer has none which is subject to execution, for the judgment, the levy, and the sale under execution ordinarily accomplish no other purpose than might have been realized by a transfer made by the defendant at the date of the inception of the judgment or execution lien. It is very usual to insert in leases provisions forbidding an assignment or underletting without the consent of the landlord, and, in effect, forfeiting them for any assignment or underletting in breach of these provisions. Hence, it has been held that a tenant, having no right to assign or underlet, has no interest which is subject to levy and sale under execution: Moser v. Tucker, 87 Tex. 94, 26 S. W. 1044; Boone v. First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594. This question has never received any thorough or satisfactory consideration from the courts. So far as considered and determined, the view sustained by the weight of authority is, that conditions in leases forbidding assignments or underletting were intended by the parties to apply only to the voluntary acts of the tenant, and hence that a lease is not forfeited by any transfer made by operation of law, included in which are sales under execution, unless it is apparent that such sales were brought about by the tenant for the purpose of evading the conditions of the lease against transfers thereof: Smith v. Putnam, 3 Pick. 221; Riggs v. Pursell, 66 N. Y. 193; Jackson v. Silvernail, 15 Johns. 278; Jackson v. Corliss, 7 Johns. 531; Mitchinson v. Carter, 8 Term Rep. 306. To hold otherwise is, in effect, to permit the creation of valuable interests in lessees which may be held by them in defiance of the demands of their creditors. On the other hand, it may be argued that a landlord, by inserting a covenant of this character in his lease, shows that he intends to deal with the lessee personally, and is unwilling to accept others as his tenant, or to permit them, without his consent, to occupy his property; and to enforce, against his protest, a sale of the tenant's interest under execution is to require him to accept a new tenant, contrary to the stipulations of his lease, and to suffer the great loss which may result to him from the diminution in value of the leased premises, through the bad faith or inefficient character of such substituted tenant": Freeman on Executions, sec. 119.

WELTY v. WELTY.

[195 Ill. 335, 63 N. E. 161.]

DIVORCE—ALIMONY, WHEN NOT ORDINARY MONEY JUDGMENT.—A decree of divorce providing that defendant should pay to complainant a certain sum on the first of each month, to continue until a designated sum is paid, "said sum to be in lieu of, and in full for, alimony, and in full for all other claims," is a decree for alimony proper, and not an ordinary money decree. (p. 208.)

DIVORCE — ENFORCEMENT OF DECREE FOR ALIMONY.—A court of chancery has power to enforce a decree for alimony by attachment for contempt, even after the expiration of the term at which the original decree for divorce and alimony was entered. (p. 210.)

DIVORCE—ALIMONY—DISCHARGE IN BANKRUPTCY.—Alimony is not a debt due from husband to wife, which may be discharged by an order in bankruptcy, whether the alimony accrues before or after the bankruptcy proceeding. (p. 211.)

Appeal from an order committing R. A. Welty to jail for contempt in failing and refusing to pay alimony. The decree of divorce awarding the alimony provided that "the defendant, Robert A. Welty, shall pay to the said Catherine Welty twenty-five dollars on the first day of each month for a period of eight months, commencing June 1, A. D. 1899, and continue until the sum of two hundred dollars is paid, said sum to be in lieu of, and in full for, alimony, and in full of all other claims of any kind or nature."

J. Stirlen, for the appellant.

H. E. Murphy, for the appellee.

337 MAGRUDER, J. 1. Appellant complains that the decree of June 9, 1899, was not a decree for alimony, but was a decree for a specific sum in lieu of alimony, his idea being that the court, by the use of the words "in lieu of," eliminated from the decree any requirement to pay money for alimony as such, and made it an ordinary decree for the payment of money. This contention is without force. The whole decree, when all of its parts are read together, is a decree for the payment of so much money for alimony, and shows upon its face that such sum of money was to be paid for the support of the appellee and for the care, custody, and education of the children.

2. Appellant further contends that the decree of divorce and for alimony, entered by the court on June 9, 1899, was a

final decree, and that the order of June 13, 1900, having been entered at a subsequent term, was void, upon the alleged ground that the court had no jurisdiction to make such order. The general doctrine is invoked that, when an action is finally determined by the entry of final judgment and the lapse of the term, the court has exhausted its jurisdiction: 1 Freeman on Judgments, 203. This contention also is without force. It has always been the law in this state that a decree for alimony is subject to modification by the court, in which [338] the decree was entered, according to the varying circumstances of the parties: Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636. Section 18 of the divorce act provides that "the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody, and support of the children, as shall appear reasonable and proper": 2 Starr and Curtis' Annotated Statutes, 2d ed., 1449. Under this section of the statute the court is invested with power to declare the termination of all alimony upon the occurrence of facts reasonably justifying such a declaration: Lennahan v. O'Keefe, 107 Ill. 620. In Cole v. Cole, 142 Ill. 19, 34 Am. St. Rep. 56, 31 N. E. 109, we said (142 Ill. 23, 34 Am. St. Rep. 56, 31 N. E. 109): "The power over the subject matter of alimony is not exhausted by the entry of the original order, but is, under the statute, continuing, for the purpose, at any time, of making such alterations thereof as shall appear to the chancellor, in the exercise of a judicial discretion, reasonable and proper": Foote v. Foote, 22 Ill. 425; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Lennahan v. O'Keefe, 107 Ill. 620.

Section 18, moreover, provides that "when a divorce shall be decreed, the court may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court." Section 6 of the divorce act provides that the proceedings thereunder shall be the same as in other cases in chancery. Section 42 of the chancery act provides that "when any bill is taken for confessed, or upon hearing, the court may make such decree thereon as may be just, and may enforce such decree, either by sequestration of real and personal estate, by attachment against the person, by fine or imprisonment, or both, by causing possession of real and personal estate to be delivered to the party entitled thereto, or by ordering the demand of the complainant to be paid out of the effects or estate sequestered, or

which are included in such decree; and by the exercise of such other powers as pertain to courts of chancery, and which may be necessary for the attainment [339] of justice": 1 Starr and Curtis' Annotated Statutes, 2d ed., 589. Section 47 also provides that "the court may, if necessary, direct an attachment to be issued against the party disobeying such decree, and fine or imprison him, or both, in the discretion of the court, and may also direct a sequestration for disobedience of any decree": 1 Starr and Curtis' Annotated Statutes, 2d ed., 592.

In construing these provisions of the divorce act and of the chancery act, this court has held that a court of chancery has power to enforce a decree for alimony by attachment for contempt, even after the expiration of the term at which the original decree for divorce and alimony was entered: Wightman v. Wightman, 45 Ill. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552; Andrews v. Andrews, 69 Ill. 609; Blake v. People, 80 Ill. 11; Dinet v. Eigenmann, 80 Ill. 276; Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821.

It sufficiently appears from the evidence in this case that the appellant was able to pay the alimony which he was required to pay, and that he refused, upon demand, to do so. It also appears that appellant was served with notice that a rule would be applied for against him to show cause why he should not be punished for disobeying the order of the court, requiring him to pay the alimony, and that such a rule was entered after such notice was given: Ex parte Petrie, 38 Ill. 498; Petrie v. People, 40 Ill. 334.

3. Appellant also assigns as error that the court below refused to allow him to show his discharge in bankruptcy as to the debt due from him to the appellee for alimony, the amount due for alimony having been scheduled by appellant in certain proceedings in bankruptcy in the United States district court for the northern district of Illinois. Appellant filed his petition in that court on July 5, 1899, to be adjudicated a bankrupt, and he was so adjudged on July 10, 1899. The contention under this branch of the case is, that the decree for alimony is a debt provable within the meaning of the [340] bankruptcy law of 1898, and is therefore discharged by appellant's bankruptcy.

The answer to this contention on the part of the appellant is to be found in the case of Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, where this court held, in substance, that ali-

mony cannot be regarded as a debt owing from husband to wife, which may be discharged by an order in bankruptcy, whether the alimony accrues before or after the bankruptcy proceeding. In the latter case it was said that "the liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty."

The holding of this court in Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, has been approved by the supreme court of the United States in the recent case of Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. Rep. 735. In the latter case it is said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. Alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction. The result is, that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony [341] accruing since that adjudication, was provable in bankruptcy, or barred by the discharge."

The judgment of the appellate court affirming the order entered by the superior court of Cook county here appealed from is affirmed.

Alimony is not Strictly a Debt due to a wife, but rather a general duty of support made specific and measured by the court: Romaine v. Chauncey, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826. See, also, Adams v. Storey, 135 Ill. 448, 25 Am. St. Rep. 392, 26 N. E. 582; monographic note to Methvin v. Methvin, 60 Am. Dec. 665-682. But a judgment for alimony has been held to be a debt of record as much as any other judgment for money is: Conrad v. Everich, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58. See, also, Trowbridge v. Spinning, 23 Wash. 48, 83 Am. St. Rep. 806, 62 Pac. 125.

A Decree for Alimony may be Enforced by an order of attachment directing the imprisonment of the delinquent husband until he obeys: Lewis v. Lewis, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918. See, also, Ex parte Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; In re Popejoy, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083. And when imprisoned for violating an order to pay alimony, he is not, on habeas corpus, entitled to his discharge on a showing that he has obtained a preliminary order in insolvency proceedings declaring him insolvent: See the monographic note to Koepke v. Hill, 87 Am. St. Rep. 184.

PEOPLE v. MALLARY.

[195 Ill. 582, 63 N. E. 508.]

HABEAS CORPUS WILL NOT LIE to test the validity of the statute under which a person is convicted of a crime. (p. 215.)

HABEAS CORPUS WILL LIE to test the validity of a statute having no reference to the conviction, but only to the detention of the prisoner after his commitment. (p. 216.)

HABEAS CORPUS WILL LIE WHERE, although the original imprisonment was lawful, yet by some subsequent act, omission, or event the prisoner has become entitled to his discharge. (p. 216.)

CONSTITUTIONAL LAW—CRIMINAL LAW.—A statute purporting to confer power upon the board of managers of a state reformatory to disregard the judgment of the trial court, and to ascertain and determine whether a prisoner has been properly sentenced to such reformatory, or whether he should not have been sentenced to the state prison, and to transfer to the latter prisoners sentenced to the state reformatory, is unconstitutional, as an attempt to confer judicial power upon an administrative board, and to imprison in the state prison without due process of law. (pp. 216, 220.)

CONSTITUTIONAL LAW.—IN ADMINISTERING THE CRIMINAL LAWS of the state there is no power outside the courts to authorize the punishment of persons for crime by confinement in the state prison, especially when the constitution expressly inhibits any person, or collection of persons, of one department of the government from exercising any power properly belonging to the others except as expressly permitted thereby. (p. 219.)

HABEAS CORPUS—CONSTITUTIONAL LAW.—Prisoners are not entitled to their discharge on habeas corpus if they have been returned to the institution to which they were at first lawfully committed, and are being held there when the petition is presented, although they may have been before that time illegally transferred to another institution temporarily under an unconstitutional statute. (p. 221.)

VOLUNTARY ESCAPE.—The doctrine of voluntary escape has no application to criminal cases and commitments to jail or prison as a punishment for crime. (p. 221.)

W. O. La Monte and J. G. Lucas, for the relators.

H. J. Hamlin, attorney general, C. S. Deneen, state's attorney, and F. L. Barnett, for the respondent.

CARTER, J. These writs of habeas corpus issued by this court, directed to the respondent, the superintendent of the Illinois State Reformatory at Pontiac, inquiring into the cause of the detention and imprisonment, the one of Cornelius Martin and the other of Ralph Dorsey. The petition and return to the writ as to Cornelius Martin show that he was convicted of burglary by the circuit court of Marion county in August, 1893, was found to be of the age of twenty years and was sentenced to the reformatory for an indeterminate term, and was received into that institution on August 5, 1893. As to Ralph Dorsey, it was shown that on the thirtieth day of April, 1897, he was convicted of burglary by the criminal court of Cook county, and was then found to be of the age of nineteen years, and was sentenced to said reformatory for an indeterminate term, and was thereupon delivered into the custody of said reformatory. Soon after April 18, 1900, said Cornelius Martin was by the action of the board of managers of said reformatory transferred to the Southern Illinois Penitentiary at Chester, as shown by the following record of their action in the premises, made an exhibit to their return:

"State of Illinois,
Illinois State Reformatory.

"Be it remembered, that on April 18, 1900, the same being one of the meeting days of the board of managers of the Illinois State Reformatory, and the said board being in session for the transaction of business, the following proceedings were had in relation to Cornelius Martin, Reg. No. 228, an inmate of said institution, and entered of record, in the words and figures following, viz.:

"'Whereas, section 15 of "An act to establish the Illinois State Reformatory and to make an appropriation therefor," as amended and in force July 1, 1897, provides that the board of managers of this institution may transfer to the penitentiary of the proper district any apparently incorrigible prisoners whose presence in the reformatory appears to be detrimental to the same; and whereas, the inmates hereafter named and directed to be transferred to the Southern Illinois Peniten-

tiary at Chester is incorrigible and his presence seriously detrimental to its success as a reformatory, as has been shown to our satisfaction; therefore it is

"'Resolved, that the superintendent of this institution be and the same is hereby directed to transfer to the Illinois State [587] Penitentiary at Chester, as soon as practicable, to be there held in accordance with law, the following prisoners: Cornelius Martin.

"'And be it further resolved, that he is hereby directed to deliver to the warden of said penitentiary, with said prisoners, the orders or processes of court upon which said prisoners were committed to this institution, also certify to the county from which they were committed the date of their receipt and a copy of this resolution under seal.

"'And be it further resolved, that the warden of said penitentiary be and is hereby required and commanded to take and keep prisoners from and after their delivery to him until paroled or discharged as authorized by law, or recalled to this institution by the board of managers, in accordance with law, provided such term of imprisonment shall not exceed the maximum term of imprisonment for the offense for which said inmates were convicted and sentenced.'"

And soon after August 18, 1900, said Ralph Dorsey was by the action of said board transferred to the Illinois State Penitentiary at Joliet under similar resolution and proceedings, also entered of record, as in the case of Cornelius Martin, and for the same cause. Afterward, soon after January 8, 1902, said Martin and said Dorsey were returned to said reformatory in pursuance of the following proceedings of said board of managers, as appears by the return to said writs: "On motion of Manager Kinney it was ordered that the superintendent be authorized to return all boys who have been transferred from the reformatory to the Joliet and Chester penitentiaries to the reformatory, subject to the writs of habeas corpus already served, and that these boys' records be examined, and that they be allowed credit for all the good time made in the reformatory and good time earned in the penitentiaries."

The relators had been returned to and were in said reformatory when the petitions were filed in this court, and the returns to the writs show that they are detained there, in each case, by virtue of the mittimus issued in due form out of the court in which the relator was convicted. [588] The grounds upon which the discharge of the relators is demanded are,

that said section 15 of the act to establish the Illinois State Reformatory is unconstitutional and void, and that the transfer of the relators to the penitentiary was a voluntary escape; that the relators could not lawfully be retaken, and that therefore their subsequent detention by virtue of the mittimus became and was without authority of law.

Said section 15 is as follows: "The board of managers shall have the power to transfer, temporarily, to the penitentiary of the proper district, any prisoner who, subsequent to his committal, shall be shown to their satisfaction to have been more than twenty-one years of age, or to have been previously convicted of crime, and may also transfer any incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution. And such managers may, by written requisition, require the return to the reformatory of any person who may have been so transferred. Each prisoner so transferred to the penitentiary shall be held therein, subject to such rules and regulations provided by the commissioners of said penitentiary in harmony with this act, unless recalled to the reformatory, as herein provided by the board of managers": Hurd's Stats. 1899, p. 1380.

The question has been raised by the attorney general and the state's attorney at the threshold, whether habeas corpus will lie to test the constitutionality of the law under which the detention of the relators is justified by the respondent. It is said that this court has decided in People v. Jonas, 173 Ill. 316, 50 N. E. 1051, that it will not. The writ was refused in that case because the relator was imprisoned by virtue of a judgment of conviction rendered by a court of competent jurisdiction to decide all questions involved, including the constitutionality of the law under which the conviction was had, and because the relator in that case could have had all errors corrected by appeal, [689] including any erroneous decision as to the validity of the statute; that it would be in contravention of the statute to allow parties convicted of offenses by courts having jurisdiction to determine all questions involved in the proceeding, to substitute the remedy by habeas corpus for the ordinary remedies for the correction of errors by appeal or writ of error. In the case at bar the question affecting the legality of the further detention and imprisonment of the relators did not arise before their conviction and sentence, but afterward, and in these ap-

plications the validity of the statute under the proceedings which were had in the circuit court is not attacked and no question of error in those proceedings is attempted to be raised. Besides, the events which, it is claimed, entitle the relators to their discharge did not happen until after the time in which they could have sued out writs of error, and the cases of the relators fall within the second paragraph of section 22 of the habeas corpus act, which provides that "where, though the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge." The sole question in this case is whether the act or event set forth in the petition, and also in the return to the writ, and which took place after judgment and after the relators had been delivered into the custody of said reformatory, entitles the relators to their discharge.

The respondent justifies the said act of the board of managers and of himself by the authority attempted to be conferred by said section 15. While it may be, from the view we take of these cases, that they could be decided without considering the validity of section 15, still we cannot say here, as we did in People v. State Reformatory, 148 Ill. 413, 36 N. E. 76, that the question of the constitutionality of said section is not properly before us. The relator in that case had not been transferred to the penitentiary under said section, while in these cases the relators [590] have been so transferred—and that is the very ground of their application for the writ. It was, however, said in the case cited that "it may be difficult to say that the provisions of said section 15 are valid," and we have no doubt that the question is one which we should finally determine in the cases here presented. Since that case was decided, in 1894, the general assembly has amended said section by an act approved June 9, 1897, by omitting from the section so much of it as provided that the person so transferred should be held in the penitentiary at hard labor, and should be so held for the maximum term provided by law for the crime for which he was convicted, unless recalled to the reformatory. Some other minor changes also were made, but the question still remains whether the section as amended is in harmony with the constitution. Section 2 of article 2 of the constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." And article 3 provides that

"the powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." And section 1 of article 6 provides that "the judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns." Other provisions are referred to, but the above are sufficient to dispose of the question as to the validity of said section 15.

It is contended on behalf of respondent that the transfer of the relators to the penitentiary because they were incorrigible and their presence in the reformatory appeared to be seriously detrimental to the well-being of the institution was merely an act of necessary discipline [591] which the board had power to exercise in the management of the reformatory. We cannot so conclude. By the transfer to the penitentiary they surrendered all control and power of discipline over the prisoners placed in their control to another and independent administrative board or authority, which, by the judgment and process of the court, had no right of custody or control over such prisoners, and to whose custody and control the court, which had all the judicial power there was in the matter, had no power to commit such prisoners. There are material distinctions, under the laws of this state, between the penitentiary and the state reformatory. In the case cited (People v. State Reformatory, 148 Ill. 413, 36 N. E. 76) we said (148 Ill. 418, 36 N. E. 78): "That in the enactment of this law it was the humane and benign intention of the general assembly to afford a means for the reformation of youthful criminals is manifest from the fact that the institution is devoted solely to the reception of minors between the ages of ten and twenty-one years." And again, at page 423 of 148 Ill. and pages 79, 80, of 36 N. E.: "There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and characters of the latter are, presumably, to a large extent as yet unformed and unsettled. The distinction may be well taken into consideration by the legislative power in fixing the punishment for crime, both in

determining the method of inflicting punishment and in limiting its quantity and duration. An adult convicted of burglary would be sentenced to the penitentiary and to either solitary confinement or hard labor therein, and the statutes which consign him to such punishment must be regarded as highly penal. A minor, however, instead of being sentenced to solitary confinement or hard labor in a penitentiary is committed to the state reformatory. The general scope and humane and benign purpose of the statute establishing the reformatory are clearly indicated in the act. It is manifest that the sentences provided for in the statute [692] establishing the reformatory, although to be regarded as punishments for crime, are not of so purely a penal character as those imposed upon adults convicted of like offenses, but that the primary object of the statute is the reformation and amendment of those committed to the reformatory."

In Henderson v. People, 165 Ill. 607, 46 N. E. 711, we held that the Illinois State Reformatory at Pontiac is not a penitentiary, and that a person under twenty-one years of age, who was shown to have been previously sentenced to the state reformatory, could not, under section 12 of said act, be properly sentenced to the penitentiary, but should have been sentenced to the reformatory. Among other things we there said (165 Ill. 610, 46 N. E. 711): "This section (section 12) authorizes the court to sentence to the reformatory where a criminal between the ages of sixteen and twenty-one is not shown to have been previously sentenced to a penitentiary in this or any other state or country. The only penitentiaries in this state are the penitentiary at Joliet and the Southern Illinois Penitentiary at Chester, and the state reformatory is distinguished from them by every clause of the section, and especially by the provision that existing laws should be applicable to the reformatory so far as to enable courts to sentence prisoners to said reformatory and not to the penitentiary. The state reformatory is nowhere designated by the legislature as a penitentiary. The reformatory is different in its object and purposes from the penitentiary, and it cannot be called a penitentiary. The main object and purpose of the reformatory, although confinement there is a punishment for crime, are the reformation of those who, from immature age, are presumably proper objects of efforts at reformation."

It seems clear that there is a material difference in the grades of punishment provided for in the two institutions. The penitentiary is a state's prison, but while those sentenced to imprisonment in the reformatory are [593] imprisoned in a state institution, still the object, purposes, and management of the institution are so different from those of a penitentiary or a mere prison that the reformatory cannot properly be designated as a state's prison, as that term is usually understood and used. It follows, as we think, that a sentence to the penitentiary, involving, as it does, infamous punishment, is a severer grade or degree of punishment than a sentence to the reformatory, and involves consequences to the convict of a much more serious character.

The question then is, Has the general assembly the power to authorize the board of managers of the reformatory—a mere executive or administrative board—to send to the penitentiary persons committed to their custody in such reformatory for a breach of discipline prescribed by such board for the government of the institution, or because the presence of such persons is detrimental to the well-being of such institution? We are of the opinion that such power is denied to the general assembly by more than one provision of the constitution. The power so attempted to be conferred is judicial, and not executive or administrative. It is not merely disciplinary, and it can only be exercised by a court vested with judicial power by the constitution. It must be observed that such transfer is not within the judgment and sentence of the court, and the act of the board is not simply a determination of the condition or circumstances under which the prisoner may be committed to the penitentiary, but it is outside of and beyond such judicial determination, and is the exercise of a judicial power which the legislature has even withheld from the courts. Doubtless, legislation might be so framed as to make the order of transfer by the board a mere determination of the conditions on which, in executing the judgment of the court, the prisoner could lawfully be transferred from the reformatory to the penitentiary; but section 15, as before said, cannot be so construed.

[594] In the administration of the criminal laws of the state there is no power outside of the courts to authorize the punishment of persons for crime by confinement in the penitentiary, and the constitution expressly inhibits any person or collection of persons of one department of government from

exercising any power properly belonging to either of the others, except as expressly permitted by the constitution, and it cannot, of course, be claimed that this case falls within any such exception. Nor can it be said that the relators were so transferred and imprisoned in the penitentiary in accordance with the law of the land or by due process of law. The transfer was made by the board, as we have seen, without lawful authority, and it was made without any hearing and without trial, but by mere resolution passed and entered upon its records. We have no doubt of the power of the board, in the exercise of its powers of discipline, to determine in that manner that the relators were incorrigible and that their presence with other inmates of the institution was seriously detrimental to the well-being of the reformatory, and to do and perform all proper disciplinary acts in the premises to punish such refractory inmates, and to obviate, as far as practicable, the injurious effects of their association with other inmates, but it is meant only to be said that the board could not commit the offenders to a state's prison to which they had not been committed by the judgment of conviction, or without trial according to the law of the land. The statute purports also to confer power on the board to disregard the finding and judgment of the court, and to ascertain and determine for itself, independently of such judgment, whether the prisoner had been properly sentenced to the reformatory and whether he should not have been sentenced by the court to the penitentiary. The statute purports to confer power upon the board to determine, from its own sources of information, to its satisfaction, that the prisoner was more than twenty-one [595] years of age when he was convicted or that he had previously been convicted of crime, and upon such determination, without regard to the judgment of the court, to transfer the prisoner to the penitentiary. But the statute makes it the duty of the courts to adjudicate upon and determine those questions, and their final judgments cannot be made subject to review and reversal by an administrative board having no judicial power. The constitution, and statutes enacted under it, provide for courts of appeal and review, and they alone have power to set aside or annul the final judgments of the trial courts.

We are referred to the case of In re Murphy, 62 Kan. 422, 63 Pac. 428, as an authority in conflict with the views we have expressed. The statute there reviewed is very similar

to the one here under consideration, but as we understand the law to be in that state, the advantages of the reformatory over the penitentiary are not confined to minors and the same distinctions do not exist between the two institutions as they do in this state, and the person convicted may by the court be sentenced directly to the penitentiary instead of the reformatory—a thing which the courts in this state cannot do. But whether these distinctions are sufficient or not to account for the different views which we entertain, we must determine in accordance with our own laws and decisions the question at issue.

We are clearly of the opinion that said section 15 is unconstitutional and void, and it must be so declared. But it does not follow that the relators are entitled to be discharged from detention and confinement in the reformatory, to which they were committed by the final judgment and process of the courts in which they were convicted. We cannot give our assent to the view that because they were unlawfully transferred to the penitentiary and have been returned to the place of confinement to which they were lawfully committed, they are now, or [596] were when the petitions were presented, entitled to their discharge altogether.

The point is made that the case is one of a voluntary escape, and that in such case the party cannot be retaken and continued in imprisonment. We cannot hold that that doctrine has any application to criminal cases. In civil cases, as in imprisonment for debt, the creditor, and not the people, is interested in the prisoner's detention, but in criminal cases the people of the whole state have an interest in the due and proper detention and punishment of the violators of the criminal law, and public interest cannot be made subservient to the illegal acts of those officers having charge of persons convicted of crime, and whose duty it is to execute the sentence of the court in accordance with its final process: Am. & Eng. Ency. of Law, 2d ed., 313. The return shows that the relators are, and were when the petitions were presented, held in the reformatory under the mittimus issued by the courts which convicted them, and not otherwise. They are therefore remanded to the custody of the authorities of said reformatory, and the writs of habeas corpus herein are dismissed at the cost of the petitioners.

Habeas Corpus is a proper proceeding, according to the weight of authority, to review a judgment of conviction, on the ground that the statute under which the conviction was had is unconstitutional: See the monographic note to Koepke v. State, 87 Am. St. Rep. 174-176. The place of imprisonment is not considered a part of the judgment, and it is generally held that a prisoner sentenced to the state prison, when he should have been sentenced to the county jail or house of correction, will not be discharged on habeas corpus: See the monographic note to Koepke v. Hill, 87 Am. St. Rep. 192.

CASES

IN THE

SUPREME COURT

OF

KANSAS.

HARDY v. JONES.

[63 Kan. 8, 64 Pac. 969.]

CONTRACT—SUPPRESSING COMPETITION.—AN AGENT who is intrusted with money to buy property at a judicial sale, under an agreement, one object of which was to prevent competition at the sale, cannot, after the agreement is executed, refuse to account for a surplus in his hands, on the ground that the agreement was against public policy. (p. 224.)

Wright & Stout and F. F. Prigg, for the plaintiffs in error.

Carr W. Taylor and John W. Roberts, for the defendant in error.

DOSTER, C. J. This is an action of accounting brought by John W. Jones against G. W. Hardy and George Turbush. It was tried to a jury and a verdict and judgment rendered in plaintiff's favor. Error has been prosecuted to this court.

A recital of the facts out of which the controversy grew is unnecessary. The plaintiffs in error admit that they purchased real estate for the defendant in error with money furnished by him, and that a surplus of the money remains in their hands. They give reasons, from their standpoint, for their failure to account to him for all the money, but the jury found against them and the finding is conclusive. A special defense of Turbush concerning one matter will be presently noticed. The money was placed with the plaintiffs in error in pursuance of a contract to buy property at a judicial sale, which contract, they say, had for its object the suppression of competition—the prevention of bidding at the sale.

Such contract, they say, was void as against public policy, and disentitles Jones to compel an accounting of the money received from him. The latter part of the proposition, [10] the conclusion from the premise of invalidity, is not the law, and if any court has ever held it to be such we have no hesitation in refusing to follow the precedent. As long as an illegal contract remains unexecuted neither party can be held to its terms. At any time before Hardy and Turbush had acted in behalf of Jones the latter might have revoked their authority, or they upon their part might have refused to execute their agency, but even in such case the agents could have been compelled to account to their principal for his money. So, likewise, will they be compelled to account for any unexpended balance remaining over from the execution of the illegal agreement. The surplus money now held by them is not held in pursuance of an illegal agreement, because that agreement has been consummated. Its repayment to Jones will not be in furtherance of an agreement to suppress competition at a judicial sale. The sale has been had, and the unexpended purchase money is now held by plaintiffs in error the same as they would hold any other money of the defendant in error. The case is quite like that of Brooks v. Martin, 2 Wall. 70, in which it was ruled: "After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms—the results of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

The reasoning in that case and authorities cited entirely dispose of the contention of the plaintiffs in error in this case: See, also, Fox v. Cash, 11 Pa. St. 207.

Turbush claims that he is not liable because he did [11] not make an agreement with Jones in his own behalf in relation to the purchase of the property, but made it in behalf of an incorporated company of which he was president, and therefore that it, if anybody, was liable; and he further says that his only object was to secure from Jones the payment of an indebtedness due to his company, and also that the verdict of the jury was inclusive of an amount which Jones agreed that he should have as payment of his company's claim. We are of the opinion, from an examination of the evidence, that Jones did promise to pay the claim of Turbish's com-

pany out of the fund primarily designed for the purchase of the land, but we are also of the opinion that the jury did not include that amount in their verdict. The verdict of the jury in behalf of Jones is not large enough to include the sum which he promised to devote to the payment of the company's claim. Under the court's instructions, the jury could exclude it from their verdict and we believe they did so. Aside from the one matter specially mentioned, there was abundant evidence to show Turbush to be equally liable with Hardy to account to Jones.

The judgment of the court below will be affirmed.

Smith, Ellis, and Pollock, JJ., concurring.

Illegal Contract.—The law cannot enforce an illegal contract, but if a servant or agent, in the prosecution of an unlawful enterprise for his master, has received money or other property, he is bound to turn it over to him. He cannot shield himself from liability on the ground of the illegality of the original transaction: Hertzler v. Geigley, 196 Pa. St. 419, 79 Am. St. Rep. 724, 46 Atl. 366; monographic note, Lemon v. Grasskopf, 99 Am. Dec. 68, 64.

PERRY v. HORACK.

[63 Kan. 88, 64 Pac. 990.]

A MORTGAGE LIVES AS LONG AS THE NOTE it was given to secure. (p. 226.)

HOMESTEAD—STATUTE OF LIMITATIONS.—A MORTGAGE on a homestead, given to secure a note executed by a husband and wife, may, after the husband's death, and after the expiration of a period of time equal to the statute of limitations, be enforced against the entire homestead, and against the interests of the widow and minor children, where the debt has been kept alive by payments made by the wife. (pp. 227, 228.)

James T. Herrick, for the plaintiff in error.

Ivan D. Rogers, for the defendant in error.

88 JOHNSTON, J. This was an action by Cornelius Perry to recover upon a promissory note for one thousand dollars 89 executed by Frank J. Horack and his wife, Nettie Horack, and also to foreclose a mortgage given as security for the note on a farm occupied by the Horacks as a homestead. The note and mortgage were executed on March 1, 1884, and they matured March 1, 1889. After making a number of small

payments, and on January 6, 1888, Frank J. Horack died, intestate, leaving as his only heirs Nettie Horack, his widow, and three children, the oldest of whom was then eight years of age and the youngest three years. The family have occupied the homestead since his death, and Nettie Horack has made payments on the debt from time to time, the last of which was on October 11, 1894. She represented to Perry that she intended to pay the debt and save the land for herself and the children. The money with which the payments were made was derived from the sale of stock, grain and produce raised by her upon the mortgaged premises, the children rendering such assistance as children of their ages are usually able to render. Mrs. Horack was appointed administratrix of the estate, but was not made the legal guardian of the children, nor was any such guardian appointed for them. The estate left by Frank J. Horack, other than the farm, was insufficient to pay funeral and administration expenses, and the note and mortgage were therefore never exhibited as a demand against the estate.

This action was brought November 26, 1895, a little more than a year after the last payment was made on the note and mortgage, and Mrs. Horack and the three children were made defendants. The children contended that as no payment had been made expressly for them and as more than five years had elapsed since the maturity of the note, the action was barred as to them and to their interest in the land. The trial court gave judgment against Nettie Horack for the amount due and decreed a foreclosure of the mortgage on an undivided half of the farm, but held that the action was barred as to the children, and refused a foreclosure of the mortgage as against the entire premises.

Was the plaintiff entitled to have his mortgage enforced against all of the mortgaged land? The payments by Mrs. Horack certainly kept the note alive, and the general rule is that the mortgage lives as long as the note it was given to secure. The minors were not parties to the note and mortgage, but they inherited the land subject to the lien of the mortgage. It is contended that the payments made by the widow should be regarded as payments made for and in behalf of the children. She was their natural guardian, and with them occupied the mortgaged premises as a homestead. It was her legal and moral duty to take charge of the homestead property, and to protect and use the same for the bene-

fit of herself and the minor children. She not only represented to plaintiff that she was going to pay the debt and protect the home for the family, but all of them had a common interest in preserving and keeping it. The homestead is an entirety, and there was such a unity of interest in it that it could not be partitioned before the youngest child arrived at majority or the widow again married.

Then, again, the payments made on the debt were from the products of the homestead itself, which it was her duty to use for the benefit of the minor children as well as herself. Since they had a joint and common interest in the homestead and were all interested alike in protecting the equity of redemption or title remaining in the homestead, it is contended that [91] the payment by the mother, their natural guardian, should be treated as a payment for them. Passing the question whether her payment should be deemed to have been made for the minors as well as for herself, we are of opinion that the mortgage was a lien upon the entire farm and enforceable against it.

If the statute of limitations does not bar a recovery on the note, it does not bar a foreclosure of the mortgage. It is conceded that the debt is not barred as to Mrs. Horack, and of course there is no bar as to the children, as they were not liable for the debt when an interest in the property passed to them, and they have not since assumed its payment. They are, therefore, not concerned as to whether payments are made or not. Mrs. Horack was liable for the entire debt, and the mortgage which she executed was given to secure the entire debt and upon all of the land. The death of her husband did not diminish the amount of the debt nor restrict the lien of the mortgage to a half or any other fraction of the land described in the mortgage. If payment had been made by one not obligated to pay the debt, there would be more reason to say that such payment did not keep the mortgage alive; but here it was made, as we have seen, by one who owned the whole debt and who joined in a mortgage given to secure the whole debt. The children had not assumed any personal liability for the debt and had nothing to do with the matter of payments, but they took the land burdened with the mortgage, and so long as the statute of limitations does not run against the debt secured by the mortgage, it would seem that the mortgage itself might be foreclosed and the property sold to pay the debt which the mortgage was given to secure: Water-

son v. Kirkwood, 17 Kan. 9; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765.

[92] Payment by Mrs. Horack kept the debt alive, and if we should treat these payments as for herself alone, the mortgage would still be enforceable. If she alone had made the note and the children had joined in a mortgage on their property to secure it, and the debt had been kept alive by payments of the maker, no one would contend that the mortgage would be barred as to the children or that it would be affected by their failure to make payments or otherwise acknowledge the existence of the debt. The children occupy no better position here, and the life of the note and mortgage no more depends upon their acts than in the case above supposed.

Considering the interest of the parties in the homestead, their relations to the debt and to each other, we conclude that, the debt having been kept alive, the mortgage which it was given to secure is enforceable against the entire property included in it. The judgment of the district court will therefore be reversed, and the cause remanded with directions to enter judgment foreclosing the mortgage upon the entire tract of land described in the mortgage.

Cunningham and Greene, JJ., concurring.

The Principal Case was Approved in Jackson v. Longwell, 63 Kan. 93, 64 Pac. 991, the facts of the latter case differing from those of the principal case in this, that while the note was executed jointly by husband and wife, the mortgage to secure it was given on real estate belonging to her; and further, the payments which kept the note alive were made by the husband without her knowledge or consent, and therefore the note became barred as to the wife by the statute of limitations. Hence, it was contended that she, being excused from personal liability on the note, and as the property mortgaged to secure the note was her individual property, therefore no foreclosure could be had. The court denied this contention, however, holding that the note was the joint and several obligation of both defendants, and that the mortgage secured the several obligation of the husband as fully as it secured the obligation of the wife. And, since the note had been kept alive as to the husband's obligation, the lien of the mortgage remained enforceable and a foreclosure could be had to satisfy the judgment rendered against the husband.

Limitations.—When an action on a note secured by a mortgage of the same date is barred by the statute of limitations, the remedy upon the mortgage is also barred: McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754. Compare Colton v. Depew, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728. But the bar of limitation does not attach to a mortgage paid in part until the statutory period has run from such payment: Stump v. Henry, 6 Md. 201, 61 Am. Dec. 300. And if the debt is revived by a new promise, this will operate to revive the mortgage: Perkins v. Sterne, 23 Tex. 561, 76 Am. Dec. 72.

PACIFIC ELEVATOR COMPANY v. WHITBECK.

[63 Kan. 102, 64 Pac. 984.]

CORPORATIONS — STOCKHOLDER'S LIABILITY—LIMITATIONS.—Where a cause of action against a corporation matures when it suspends business, and is barred in three years by the statute of limitations, an action against a stockholder is barred in the same length of time, although no action could be begun against the stockholder until one year after the bank had suspended business. (p. 231.)

CORPORATIONS.—A STOCKHOLDER'S LIABILITY TO THE CREDITORS OF A CORPORATION is contractual, though it is separate and collateral to the liability of the corporation. (p. 230.)

CORPORATIONS.—SINCE A STOCKHOLDER STANDS IN THE RELATION OF SURETY TO THE CORPORATION, HIS LIABILITY must cease when the liability of the corporation no longer exists. (p. 230.)

PRINCIPAL AND SURETY.—NO ACTION CAN BE MAINTAINED AGAINST A SURETY unless the liability of the principal exists at the time the action is commenced. (p. 230.)

Sankey & Campbell, for the plaintiff in error.

Thomas B. Wall, for the defendant in error.

[102] GREENE, J. The defendant in error was the owner of forty-five shares of stock in the Bank of Andale, and the plaintiff in error was a depositor in said bank. On October 17, 1893, the bank suspended business, owing plaintiff in error. A receiver was appointed, and his final report was made on June 25, 1896. The plaintiff in error proved its claim before the receiver and received dividends thereon, the last being paid in August, 1896. On November 10, 1896, plaintiff in error commenced this action to recover from defendant in error on his statutory liability the indebtedness [103] due it from the bank. The defendant pleaded the three year statute of limitations, to which the plaintiff filed a demurrer, which was overruled, and the plaintiff excepted. The parties then entered into an agreed statement of facts. The material and substantial parts, and all that is necessary for a complete understanding of the case and for the purpose of determining the question involved, are stated above. Upon this agreed statement, the court rendered judgment for defendant, and the plaintiff brings the case here.

The question involved is the application of the statute of limitations. The plaintiff's cause of action against the corporation matured when it suspended business, and this action

not having been commenced for more than three years thereafter, it was barred as against the corporation at the time.

Section 2, article 12, of the constitution provides that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." In this state, no other means have been provided to secure the dues from a corporation. A stockholder's liability to the creditors of a corporation is contractual; it is separate and collateral to the liability of the corporation. While a stockholder is not in all respects a surety for the debts of the corporation, still he stands in the relation of a surety, and in determining the question involved in this case we shall so treat him. In Morawetz on Private Corporations, section 883, it is said: "The special individual liability of the members of a corporation is not intended to be the primary source for the payment of the corporate debts. The fund [104] subscribed by the shareholders at the formation of their company is expected to be the company's sole working capital and the means of satisfying its creditors. Any additional individual liability assumed by the corporators is intended merely as a secondary security for creditors, in case the capital supplied for carrying on the company's business should be lost in speculation." To the same effect are the following cases: Brown v. Hitchcock, 36 Ohio St. 667; Wright v. McCormack, 17 Ohio St. 86; Hawthorne v. Calef, 2 Wall. 10.

Section 1310 of the General Statutes of 1901 reads: "A corporation is dissolved: 1. By the expiration of the time limited in its charter; 2. By a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

According to the agreed statement of facts, the Bank of Andale suspended business October 17, 1893. Therefore, under the above provision of the statute, the plaintiff in error might have commenced its action against the defendant in error at any time thereafter after the expiration of one year.

The stockholder standing in the relation of surety to the corporation, his liability must cease when the liability of the

corporation no longer exists. Manifestly, and in conformity to well-recognized legal principles, no action can be maintained against a surety unless the liability of the principal exists at the time the action is commenced: See monographic notes to Leeds Lumber Co. v. Haworth, 60 Am. St. Rep. 207. Conceding, but not deciding, [105] that the statute of limitations did not begin to run against the stockholder until one year after the bank had suspended business, and that thereafter the plaintiff had three years in which to bring its action against the stockholder, it could not recover in such action unless it had a valid and subsisting demand against the corporation enforceable at law, and this demand it would have to establish before it could recover a judgment against the stockholder. The liability of a stockholder is only such as the statute creates, and, under the statute, he is only liable for the debts of the corporation which are at the time enforceable against the corporation. The plaintiff in error had no claim that could be enforced against the corporation when it commenced its action against the stockholder; therefore the stockholder is not liable.

The judgment of the court below is affirmed.

Johnston and Cunningham, JJ., concurring.

The Liability of Stockholders for the debt of the corporation is contractual: Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; Bell v. Farwell, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346; Kulp v. Fleming, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. But see Marshall v. Sherman, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419; Crippen v. Laighton, 69 N. H. 540, 76 Am. St. Rep. 192, 44 Atl. 538. And it is generally considered primary: McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 848-852. On the limitation of actions to enforce the statutory liability of stockholders, see Kelly v. Clark, 21 Mont. 291, 69 Am. St. Rep. 668, 53 Pac. 959; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; Hunt v. Ward, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 827-829.

CITY OF OTTAWA v. GILLILAND.

[63 Kan. 165, 65 Pac. 252.]

JURY—ERRONEOUS VERDICT.—A verdict obtained by dividing the sum of the amounts to which each juror thinks the plaintiff is entitled by the number of jurors, and increasing such amount to an even sum, where such sum is not the result of a deliberate consideration and decision of the cause upon its merits, cannot be sustained. (p. 233.)

EVIDENCE OF PHYSICIANS.—IN AN ACTION FOR PERSONAL INJURIES, THE INJURED PARTY MAY CALL PHYSICIANS, to whom he may expose his person, for the purpose of using the expert testimony to assist him in the trial of his case. (pp. 235, 236.)

EVIDENCE—EXHIBITION OF PERSON.—IN AN ACTION FOR PERSONAL INJURIES, THE INJURED PARTY MAY EXPOSE THE INJURED PORTION OF HIS PERSON TO THE JURY, observing the rules of decency. (p. 236.)

DIVORCE.—A PHYSICAL EXAMINATION was allowed at common law, in the ascertainment of the physical condition of litigants in divorce actions. (p. 236.)

EVIDENCE—PHYSICAL EXAMINATION.—IN ACTIONS FOR PERSONAL INJURIES, A COURT HAS POWER TO REQUIRE THE PLAINTIFF TO SUBMIT TO A PRIVATE PHYSICAL EXAMINATION by a board of physicians selected by the court, such power to be exercised with discretion, and only when necessary to a full determination of the facts. (p. 238.)

A. A. Howell, C. A. Smart, and H. W. Page, for the plaintiff in error.

William A. Deford and F. A. Waddle, for the defendant in error.

[165] GREENE, J. The defendant in error commenced this action against the city of Ottawa to recover damages for personal injuries which she claims she sustained by reason of having been tripped or thrown on a defective sidewalk. In the court below she recovered judgment. The plaintiff in error, the defendant below, filed its motion for a new trial, alleging all the grounds mentioned in the statute. In support of the [166] charge of misconduct on the part of the jury, it filed the following affidavit of one of the jurors: "M. L. Waldo, being duly sworn, on his oath says: I was a juror in the above-entitled cause tried at the September term of Franklin district court, 1895. In determining the amount of the verdict rendered therein, it was agreed that each juror should give the sum to which he thought the plaintiff was entitled under the evidence, and that the sum of these amounts so given should be divided by twelve, or the number of the jurors, and that

the amount, or average resulting therefrom, should be the amount of the verdict, which was accordingly done. I further state that the sum of three hundred dollars, the amount of the verdict, was the average found, substantially, being a few dollars in excess of the actual average, which, to make the amount an even sum, was increased to three hundred dollars."

It appears from this affidavit that it was agreed by the jury that each juror should give the sum to which he thought the plaintiff below was entitled, and that the sum of these amounts should be divided by the number of jurors, the quotient to be the amount of plaintiff's verdict. This was done. The amount so found was nearly three hundred dollars, but for the purpose of making the amount an even sum it was increased to three hundred dollars. This verdict cannot be sustained: Johnson v. Husband, 22 Kan. 277; Werner v. Edmiston, 24 Kan. 147. After the amount was found by marking, aggregating, and dividing, there was no reconsideration. The addition to that amount was not made after a further consideration and decision of the cause upon its merits, but was for the one purpose of making an even amount. The law demands of each juror an honest consideration of the rights of the parties litigant and the exercise of his best judgment, guided by the law and evidence of the case. A verdict reached in any other way should [107] be set aside. We think the court erred in not granting the defendant below a new trial.

Counsel for plaintiff in error present another question which will likely arise in a new trial of this cause, and for this reason it demands the attention of this court at this time. Upon the trial, defendant requested the court to appoint two reputable physicians and make an order that the plaintiff below submit to an examination by them, for the purpose of ascertaining the location and extent of her physical injuries. To this the plaintiff below objected, which objection was sustained by the court, and the defendant below alleges this as error.

In the case of Atchison etc. R. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659, it was held by this court that "it was reversible error for the court to refuse to make an order for the examination of the eyes of the plaintiff," and the correctness of that decision has never been questioned. The application in this case was that the plaintiff below submit the unexposed portion of her person to the examination of a committee of physicians selected by the court. Upon this question there has been considerable diversity of opinion. In New York, it was

held that a court had no power to make such an order. Afterward it was held that such power was inherent in the court; but in the decision of McQuigan v. Delaware etc. R. R. Co., 129 N. Y. 50, 26 Am. St. Rep. 507, 29 N. E. 235, it was finally settled as the law of that state that the court possessed no such power. Following this decision, and in 1893, the legislature of that state amended its Code of Civil Procedure, conferring upon the courts authority, in actions for personal injuries, and, upon proper application and showing of necessity, the power, to make an order that the injured party submit to a medical examination.

168 In Missouri, in Loyd v. Hannibal etc. R. R. Co., 53 Mo. 509, it was proposed to call in two surgeons to make a physical examination during the progress of the trial. This was refused, on the ground, as stated by the court, "that it was unknown to our practice and to the law." But in Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629, 55 Am. Rep. 390, the court modified its previous holdings, saying: "There are respectable authorities which hold that the court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion, which will not be interfered with unless manifestly abused."

In Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588, in an action on a promissory note given in settlement of a threatened action for damages which it was claimed the plaintiff had suffered to his eyes by reason of the negligent acts of defendant, on the trial the defendant asked an order requiring the plaintiff to submit to the examination of his eyes by medical experts. The trial court refused, and the supreme court, in passing upon the question, dismissed the subject in the following language: "Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. The court had no power to make or enforce such an order."

In Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860, in an action for personal injuries, the court said: "In the absence of a statute authorizing it, and none exists in this state, a party to an action is not required to submit his person to an examination of his injuries by surgeons appointed by the court for that purpose."

[169] In the case of Union Pac. R. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, the supreme court of the United States expresses its dissent in the following language: "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." This decision was followed in Illinois Cent. R. R. Co. v. Griffin, 80 Fed. 278, 25 C. C. A. 413.

These are the principal authorities against the proposition which in our research we have been able to discover. In several of the states this question has been presented and a decision avoided, as appears in the cases of Sioux City etc. R. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N. W. 336; City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62; I. & G. N. Ry. Co. v. Underwood, 64 Tex. 463; Gulf etc. Ry. Co. v. Norfleet, 78 Tex. 321, 14 S. W. 703. We think, however, that the great weight of authority, as well as reason, is against the decisions of the courts above cited, and in favor of the opinion that, when a proper case presents itself, the court not only has the power to require a plaintiff in an action to recover damages for personal injuries to submit to a physical examination, but that it ought to exercise it. The opinion in the case of Union Pac. R. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, is greatly [170] weakened by the dissenting opinion of Mr. Justice Brewer, concurred in by Mr. Justice Brown, and we think the latter the better reasoning. While we have the greatest respect for the decision of that court, the opinion in that case does not convince our reason. We think it a sacrifice of justice and the rights of parties to sentiment. In actions for personal injuries, the exact location and extent of the injury is frequently the very question in dispute, the fact to be ascertained. While the court, in the exercise of its discretion, should protect the feelings and sensibilities of all litigants, the rights of the parties and the ascertainment of the

truth is the chief object of a trial. The purpose of a trial is to mete out exact justice. This cannot be accomplished when the truth is suppressed, and this may be done, if the court has not the power to ascertain what the truth is.

In an action for personal injuries, the injured party may call physicians, to whom he may expose his person, not for the purpose of effecting a cure, but for the purpose of using this expert testimony to assist him in the trial of his case. He may also expose the injured portion of his person to the jury, observing the rules of decency. Should the litigant be permitted to withhold the truth or the means of ascertaining what the truth is simply because, in the ascertainment of the truth, he may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May he be permitted to present so much of the truth as he desires and as he thinks to his interest and withhold the remainder? This would certainly be his privilege if the court does not possess the power to make an order that will develop the exact truth. It is suggested by some of the authorities which hold contrary to the views herein expressed, [171] that the rule would operate harshly upon delicate and modest females. We think such may safely rely upon the courts of this country. An examination should not be ordered needlessly, or where there might be a shock to one's modesty or feelings of delicacy. We only decide that the court has the power; it should be exercised according to the sound discretion of the presiding judge. It is safer in the administration of justice to trust to the courts to protect the sensibilities of the parties in such examinations, so far as it is possible to do so, and beyond that to hold them subordinate in importance and sacredness to the interest of justice, than to hold that a party to a litigation has it within his power to develop so much of the facts as may appear to be to his interest, and then stop the investigation.

The great weight of authority seems to favor this view. In the ascertainment of the physical condition of the litigants in divorce actions, a physical examination was allowed at common law: Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. Dec. 443; Newell v. Newell, 9 Paige, 25. The authorities supporting this doctrine in actions for personal injuries are numerous and ample. In O'Brien v. City of La Crosse, 99 Wis. 421, 75 N. W. 81, the court held: "In an action for personal injuries, the defendant has, in the absence of statute, no absolute right

to have a personal examination of the injured party by physicians, but such right rests in the sound discretion of the court."

In Miami etc. Turnpike Co. v. Baily, 37 Ohio St. 104, the court said: "In an action to recover for personal injuries caused by the negligence of the defendant, the court has power to require the plaintiff to submit his person [172] to an examination by physicians or surgeons, when necessary to ascertain the nature and extent of the injury."

In Graves v. City of Battle Creek, 95 Mich. 266, 269, 35 Am. St. Rep. 561, 54 N. W. 757, 758, the court used the following language: "The question whether the trial court has the power, under any circumstances, to require the plaintiff in an action for personal injuries to submit to an examination by a physician before the jury of the portion of the body alleged to have been injured, is answered in the affirmative."

In speaking of the decision of the case of Union Pac. R. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, the court said: "This decision is entitled to very great weight, but, in view of the manifest justice of a requirement that the plaintiff in case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon this subject."

In Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147, which was an action for personal injuries, it was said: "The court may require a plaintiff suing for personal injuries, alleged to be permanent, to submit to an examination of his person by experts, and may direct that it be made in court or elsewhere."

In Richmond etc. R. R. Co. v. Childress, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, it was held: "It is within the discretion of the trial court to require the plaintiff suing for physical injury alleged to be permanent to submit to an examination by competent physicians, at the instance and at the expense of the defendant in the action, to ascertain the nature, extent and probable duration of the injury, so as to afford means of proving the same at the trial."

[173] In Alabama Great Southern R. R. Co. v. Hill, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, it was held: "Where the plaintiff, a young unmarried woman, sues to recover damages for personal injuries sustained from the derailment of the car in which she was riding as a passenger on the defendant's railroad, and her attending physician has testified, from an exam-

ination of her person several times repeated, as to the nature, character, extent, and probable consequence of her internal injuries, but the correctness of his diagnosis is questioned by other physicians, the defendant has the right to insist that she shall submit to a personal examination by one or more other physicians or surgeons, under the direction and control of the court, and the refusal to order such examination is a reversible error, when it appears that her life or health would not be thereby endangered."

In Thompson on Trials, section 859, it is said: "In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other courts, taking the more enlightened view that the object of a judicial trial is to enable the state to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it."

We are of the opinion that the trial court has the [174] power, in actions for personal injuries, to require the plaintiff to submit to a private physical examination by a board of physicians selected by the court; that such power should be exercised cautiously, and only when necessary to a full determination of the facts, and with every care possible to protect the feelings and sensibilities of the party. In this case, the court did not abuse its discretion.

For the other reasons herein expressed, the judgment of the court below is reversed.

Johnston, Cunningham, and Ellis, JJ., concurring.

The Physical Examination of Parties by order of court is considered in the monographic notes to Cleveland etc. Ry. Co. v. Huddleston, 68 Am. St. Rep. 242-252; Sidekum v. Wabash etc. Ry. Co., 8 Am. St. Rep. 554-557; Sioux City etc. R. R. Co. v. Finlayson, 49 Am. Rep. 726-730. A court has power to order, upon the application

of the defendant, an examination of the plaintiff's person to determine the nature and extent of the injuries complained of: South Bend v. Turner, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271; Wanek v. Winona, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851; but not by a doctor named by the defendant: Stack v. New York etc. R. R. Co., 177 Mass. 155, 83 Am. St. Rep. 269, 58 N. E. 686. See, further, Belt Electric Line Co. v. Allen, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89.

BLACK v. ELLIOTT.

[63 Kan. 211, 65 Pac. 215.]

THE STATUTE OF LIMITATIONS WILL RUN UPON THE CLAIM OF A CREDITOR AGAINST THE ESTATE OF A DECEDENT, although no administrator has been appointed. (p. 239.)

A JUDGMENT OF A COURT OF COMPETENT JURISDICTION IS CONCLUSIVE UPON ALL OF THE PARTIES to it, as a general rule, and may not be attacked collaterally except upon grounds of fraud or mistake. (p. 239.)

ESTATES OF DECEDENTS.—UNDER THE KANSAS STATUTES, AN ADMINISTRATOR TAKES TITLE TO THE PERSONAL ESTATE, is entitled to its possession, and may maintain any possessory action to enforce such right. (p. 240.)

ESTATES OF DECEDENTS.—THE ALLOWANCE OF A CREDITOR'S CLAIM AGAINST A DECEDENT'S ESTATE by the probate court is, so far as the personal estate is concerned, binding upon the administrator and on such estate. (p. 241.)

ESTATES OF DECEDENTS.—THE TITLE TO REAL ESTATE, UPON A DECEDENT'S DEATH, descends at once to the heir, who is entitled to the possession thereof, no right or title therein going to the administrator. (p. 241.)

ESTATES OF DECEDENTS.—AT COMMON LAW, IF A CREDITOR OF A DECEDENT DESIRED TO SUBJECT SUCH DECEDENT'S REAL PROPERTY to the payment of his claim, he was required to bring his action directly against the heir for that purpose. (p. 241.)

ESTATES OF DECEDENTS—SUBJECTING REAL PROPERTY TO PAYMENT OF DEBTS.—In any proceeding, either in the probate court or in equity for the purpose of subjecting the lands of an heir or devisee to the payment of a claim against the ancestor, such persons may contest the legality of such claim, regardless of whether it has been duly allowed by the probate court as a claim against the estate. (p. 242.)

Snoddy & Snoddy, for the plaintiff in error.

W. T. Johnston and John C. Sheridan, for the defendants in error.

[212] CUNNINGHAM, J. The contention of the plaintiff in error raises two questions, as follows: 1. Did the [214] statute of limitations run upon the claim of Mrs. Black as against

the estate of G. E. De Forrest during the time that there was no administrator? 2. If it did, might the mortgagee, John Elliott, or the heirs of G. E. De Forrest, attack the allowance thereof by the probate court in favor of the plaintiff in error, in this collateral proceeding?

The first question we must answer in the affirmative, on the authority of Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051, and Kulp v. Kulp, 51 Kan. 341, 32 Pac. 1118. There is no occasion to add anything to the reasoning in these cases. The doctrine as therein set out is well supported by reason and authority. We must hold that at the time of the allowance of Mrs. Black's claim by the probate court the same was barred by the statute of limitations as to the G. E. De Forrest estate.

The second question presents greater difficulty. It is a general rule of law that a judgment of a court of competent jurisdiction is conclusive upon all of the parties to it, and may not be attacked collaterally except upon grounds of fraud or mistake. This rule extends to all parties to the action in which a judgment was rendered and their privies. Probate courts in this state have "jurisdiction and care of estates of deceased persons." One item of such jurisdiction is the allowance of claims against the estates of such persons. No provision is made whereby the heirs or those holding under them are made parties to such procedure, and no right is given by statute to such heirs to appeal from the allowance of any claim by the probate court. In fact, they are wholly strangers to that proceeding, unless it can be said that they are represented by the administrator.

Under our statute the administrator takes title to [215] the personal estate. He is entitled to the possession of it, and may maintain any possessory action to enforce such right. He is required to sell and dispose of the same, and we think that so far as such personal estate is concerned the allowance of a claim by the probate court in favor of a creditor is binding on the administrator and on the decedent's personal estate. As to the real estate, the title of the decedent upon his death descends at once to the heir, who is entitled to the possession thereof. No right or title therein goes to the administrator—not even possession. He may, however, in case the personal property is found to be insufficient to pay the debts of the deceased, proceed in the manner pointed out by the law to sub-

ject so much nonexempt real estate as may be necessary to the payment of such debts. In doing so he must pursue the manner pointed out by the statute—file a petition showing the necessity for such sale, and give such notice of the application for an order therefor as shall be directed by the probate court. Then, for the first time, the title to the real estate inherited by the heir is threatened, and then, for the first time, has he an opportunity to be heard as to the validity of the claims which are sought to be paid out of his property.

At common law, the administrator might never under any circumstances lay his hand upon the real estate which had descended to the heir, and if a creditor desired to subject the same to the payment of his claim against the ancestor, he was required to bring his action directly against the heir for that purpose, in which action the heir had the opportunity and right to contest the validity of the claim which was sought to be made a charge on his inherited real estate. We see no reason why the same principle should not obtain [216] when the administrator makes application for an order to sell such real estate. We think that the authorities are abundant to uphold this view.

In Woerner on American Law of Administration, section 466, the whole matter is discussed in the following language: "Since the executor or administrator does not, in most of the states, represent the devisee or heir in the matter of paying the debts of the deceased, holding for that purpose the personalty, which is the primary fund out of which they must be paid, he assumes a relation rather antagonistic to the heirs whenever he seeks to subject the real estate, which has descended not to him, but to them, to sale for the payment of debts. It follows that a judgment against him in favor of creditors, although binding upon the personalty, is not necessarily binding upon the heirs to the extent of subjecting the real estate descended to them for the satisfaction of any such judgment, although it may be of prima facie validity. Hence, before there can be a valid order devesting them of their title by a sale for the payment of debts, they must have an opportunity to be heard, and to contest not only the necessity or propriety of the sale, but also the justice and validity of the debts for the payment of which the sale is demanded."

In O'Flynn v. Powers, 136 N. Y. 419, 32 N. E. 1087, it was said: "But where real estate devised or descended is sought to be charged with the debts of the decedent, the validity and

existence of the debts are open to contest by the heirs or devisees in the proceeding, and the decree of the surrogate on the accounting does not conclude them": See, also, Jackson v. Weaver, 98 Ind. 307; First Baptist Church of Hoboken v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Long v. Long, 142 N. Y. 552, 37 N. E. 486; Saddler v. Kennedy, 26 W. Va. 636; Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358.

217 Some of the above cases go to the extent of holding that the allowance of a claim is not even prima facie evidence against the heir of its justness.

In the case at bar, Jones, the administrator, was not made a party, and we have some doubt whether in his absence the district court had jurisdiction to decree a sale of the land for the payment of the debts; but we have passed that question for the purpose of discussing the fundamental one, whether under any circumstances the heir was deprived of the right of questioning the creditor's claim by reason of its allowance by the probate court. We conclude both from reasoning and authority that in any proceeding brought either in the probate court or in equity, such as the one at bar, for the purpose of subjecting the lands of any heir or devisee to the payment of a claim against the ancestor, such heir or devisee or any person holding under them may contest the legality or justness of such claim, and that regardless of whether it has been duly allowed by the probate court as a claim against the estate. And in this case, as the claim was barred by the statute of limitations when allowed by the probate court, and therefore no valid and enforceable claim against the estate, it follows that the plaintiff in error cannot have any lien on the lands in question as against Elliott, the mortgagee, or the heirs, or subject the same to sale for the payment of such claim, and that therefore the decree of the district court was correct and should be affirmed.

Johnston, Greene, and Ellis, JJ., concurring.

Estate of Decedent.—At the common law the real property of a deceased descends to the heir, and neither the executor nor administrator takes any interest or estate therein. The personal property, however, vests in the executor or administrator, and he has absolute dominion over it: See the monographic note to Fletcher v. American Trust etc. Co., 78 Am. St. Rep. 175, 179.

The Sale of a Decedent's Land to make assets for the payment of his debts passes no title as against his heirs or devisees not made parties to the proceeding in which the order directing the sale was made: Perry v. Adams, 98 N. C. 167, 2 Am. St. Rep. 326, 3 S. E.

729. But see Neville v. Kenney, 125 Ala. 149, 82 Am. St. Rep. 230, 28 South. 452. A sale of the real estate for the payment of a debt barred by the statute of limitations is void: Smith v. Wildman, 178 Pa. St. 245, 56 Am. St. Rep. 760, 35 Atl. 1047. But see Cobb v. Garner, 105 Ala. 467, 53 Am. St. Rep. 136, 17 South. 47.

The Approval of a Claim Against a Decedent's Estate by the probate court, which has been allowed by the administrator, is a quasi judgment against the estate, and can be annulled only on a direct proceeding to set it aside: Giddings v. Steele, 28 Tex. 733, 91 Am. Dec. 336. An heir may institute proceedings to set aside the approval of a claim, on the ground that the allowance was fraudulent: Giddings v. Steele, 28 Tex. 733, 91 Am. Dec. 336.

KINCAID v. NATIONAL WALL-PAPER COMPANY.

[63 Kan. 288, 65 Pac. 247.]

PARTNERSHIP CREDITORS—INDIVIDUAL DEBTS.—The members of an insolvent partnership, all the partners consenting, may, in good faith, appropriate their own interests in the partnership property to the payment of their individual debts in preference to those of the partnership. (p. 244.)

PARTNERSHIP CREDITORS HAVE NO LIEN upon the partnership property. (p. 244.)

PARTNERS HAVE AN EQUITY IN THE PARTNERSHIP PROPERTY TO COMPEL ITS APPROPRIATION TO THE PAYMENT OF PARTNERSHIP DEBTS, as against the debts of individual members of the firm. (pp. 244, 245.)

Kos Harris and O. G. Eckstein, for the plaintiff in error.

J. V. Daugherty, for the defendant in error.

288 DOSTER, C. J. This was a garnishment proceeding brought by the National Wall-paper Company, the creditor, against William Kincaid, the garnishee. C. A. Garrett and H. O. Kincaid, as a partnership, owed 289 the National Wall-paper Company. Each of them was individually indebted to William Kincaid. These debts were each for the sum of four hundred and twenty dollars, and, to secure them, each partner executed a mortgage on his undivided half interest in the partnership property, and each partner indorsed upon the other's mortgage his consent thereto. The partnership was insolvent at this time. The mortgages were given in good faith, to secure bona fide debts. The question, therefore, is whether members of a partnership may prefer their individual to their partnership creditors by the execution of liens upon their own interests in the partnership property, each party

consenting to the act of the other. This question has been several times discussed before the court and adverted to in some of the opinions: Woodmansie v. Holcomb, 34 Kan. 35, 7 Pac. 603; Berkley v. Tootle, 46 Kan. 335, 26 Pac. 730; Mannen v. Bailey, 51 Kan. 446, 32 Pac. 1085; Tootle v. Rice, 53 Kan. 581, 36 Pac. 990. In the last two cases the question was stated and attention called to opposing authorities, but no decision was made. In Woodmansie v. Holcomb, 34 Kan. 35, 7 Pac. 603, it was ruled in the syllabus: "While the partnership remains in existence and in a solvent condition, it may, upon a bona fide consideration, all the partners assenting, transfer and appropriate the firm property in payment of the individual debt of one of its members."

In the opinion it was remarked: "The decisions of the courts have gone further than this, and, although not unanimous, the weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property and of the right to dispose of the same as they may choose; and where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a [290] fair price for the property purchased, such purchase cannot, of itself, be held fraudulent as against the general creditors of the firm."

In Berkley v. Tootle, 46 Kan. 335, 26 Pac. 730, it does not clearly appear that the partnership was insolvent, but the case seems to have proceeded upon the assumption that it was, and the foregoing extract from the opinion in Woodmansie v. Holcomb, 34 Kan. 35, 7 Pac. 603, was quoted as the law applicable to the facts under consideration. It is questionable, indeed, whether the remarks made in the case of Woodmansie v. Holcomb, 34 Kan. 35, 7 Pac. 603, were necessary to the decision of that case, but subsequent cases, and especially that of Berkley v. Tootle, 46 Kan. 335, 26 Pac. 730, appear to have regarded with favor the rule announced.

We are of the opinion, now that the question is directly presented, that the members of an insolvent partnership, all the partners consenting, may, in good faith, appropriate their own interests in the partnership property to the payment of their individual debts in preference to those of the partnership. It has been loosely said that partnership creditors have a lien on the partnership property, but this is not true, and we think that no court has so decided, in the sense those words imply. The partners themselves have an equity in the partner-

ship property to compel its appropriation to the payment of partnership debts, as against the debts of the individual members of the firm, and to this equity the partnership creditors succeed in cases and under circumstances which will enable them to enforce it, and that ordinarily, if not always, is when the partnership is in the control of the court, and its assets are in the course of administration by the court, either through the bankruptcy of the firm or the creation of a trust in some mode.

201 Strong and well-considered decisions in which this doctrine is asserted, with citations to numerous authorities, are Case v. Beauregard, 99 U. S. 119; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543. These cases are entirely in point in the present controversy. The facts in each are almost identical with those in the present case. In the one last cited, it was tersely remarked that "members of a partnership largely indebted and insolvent may lawfully mortgage the firm property to secure an individual indebtedness, if, in so doing, they act in good faith." This we believe to be the law.

The judgment of the court below is reversed, with directions to proceed in accordance with this opinion.

Smith and Pollock, JJ., concurring.

Partnership Creditors have no lien, strictly so called, on partnership assets: Thayer v. Humphrey, 91 Wis. 276, 51 Am. St. Rep. 887, 64 N. W. 1007; Goldthwaite v. Janney, 102 Ala. 431, 48 Am. St. Rep. 56, 15 South. 560; Carver Gin Co. v. Bannon, 85 Tenn. 712, 4 Am. St. Rep. 803, 4 S. W. 831. As to the relative rights of firm and individual creditors, see Pott v. Schmucker, 84 Md. 535, 57 Am. St. Rep. 415, 36 Atl. 592; Rock v. Collins, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426; Franklin Sugar Co. v. Henderson, 86 Md. 452, 63 Am. St. Rep. 524, 38 Atl. 991. The right to have partnership property first applied to partnership debts is primarily for the benefit of the partners: Noyes v. Ross, 23 Mont. 425, 75 Am. St. Rep. 543, 59 Pac. 367; Farwell v. Huston, 151 Ill. 239, 42 Am. St. Rep. 237, 37 N. E. 864. As to the effect on firm creditors of applying partnership property to the individual debts of the partners, see the monographic note to Smith v. Smith, 43 Am. St. Rep. 373, 374. And on the levy on partnership assets of a writ against one partner only, see the monographic note to Russell v. Cole, 57 Am. St. Rep. 436-443.

TOOTLE v. ELLIS.

[63 Kan. 422, 65 Pac. 675.]

THE EXECUTION OF A JUDGMENT MAY NOT BE ENJOINED simply because no sufficient summons was served, unless it is shown that the defendant had a defense, in whole or in part, to the judgment rendered. (p. 247.)

JURISDICTION.—THE PERSONAL SERVICE OF A SUMMONS, issued under the hand of the clerk and the seal of the court, informing the defendant that he had been sued and that he must answer within a given time, gives the court jurisdiction over such defendant. (p. 247.)

VOID JUDGMENTS—INJUNCTION.—THE FAILURE TO INDORSE ON A SUMMONS, as required by statute, the amount for which judgment would be taken if the defendant failed to answer, does not make the judgment rendered in such action void, so that its enforcement can be enjoined. (p. 248.)

Edwin A. Austin, Charles S. Briggs, and Pleasant & Pleasant, for the plaintiffs in error.

Harvey & Harvey, for the defendants in error.

423 CUNNINGHAM, J. Tootle, Hanna & Co. sued Ellis & Co. in the district court of Osage county, Kansas, their cause of action being on four promissory notes executed by the defendants. A summons was issued, regular in all respects, except that "the amount for which, with interest, judgment would be taken if the defendant failed to answer" was not indorsed thereon. The praecipe for summons filed by the plaintiffs did not request that it should be indorsed. Judgment was rendered for twelve hundred dollars, by default, on November 18, 1885. This judgment was kept alive, and on October 13, 1897, execution was issued thereon and duly levied upon the nonexempt lands of the defendants. They then brought this action against the sheriff and the judgment creditors to declare said judgment to be null and void and to enjoin the selling of the land levied on and the collection of the judgment. In this injunction action, the pleadings, summons and judgment in the first action were fully set out. The petition also contained an allegation that the plaintiffs had a valid defense to the original action brought by Tootle, Hanna & Co. A demurrer to this petition was overruled, and the defendants answered by a general denial. Upon the trial no evidence was offered by the plaintiffs in support of their allegation that they did not owe the notes sued on in the original

action, in whole or in part, or that they had any defense whatever to them. The court awarded the plaintiffs judgment, and declared the former judgment void, and enjoined the collection of it in any manner.

These facts present two questions: 1. Admitting the judgment to be void by reason of the omission to [424] indorse on the summons the amount for which, with interest, judgment would be taken if the defendants failed to answer, may defendants in error have the collection of such judgment enjoined without showing that they have a defense, in whole or in part, to the original action? 2. Did the failure to make such indorsement render the judgment void? We answer both in the negative.

The execution of a judgment may not be enjoined simply because no sufficient summons was served, unless it is shown that the defendant had a defense, in whole or in part, to the judgment rendered. Some cases hold that, in cases where no process at all has been served on the defendant the collection of the judgment may be enjoined without showing a defense to the original action, but a large preponderance of the authorities hold that, notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the result, upon a subsequent trial, will be other than, or different from, that already reached; or, in other words, that there was a defense to the action, either entire or partial: Freeman on Judgments, sec. 489, and cases cited. The general principle, as laid down in High on Injunctions, section 114, is that it must be shown to be against good conscience to execute the judgment sought to be enjoined.

In this case a summons was served, issued under the hand of the clerk and the seal of the court. It informed the defendants that they had been sued, and that they must answer the petition by a given time. This gave the court jurisdiction of them. The judgment rendered therefor was not void. They might have taken advantage of the omission of the indorsement had they chosen so to do by some movement in [425] the case. This they did not do. They paid no attention to the information contained in the summons that they had been sued. They gave no heed to the warning of the court that they must answer.

True, the statute adds that if the defendants fail to answer, judgment shall not be rendered against them for a larger amount than that indorsed on the summons and costs, but this

is not a part of the summons; it is but an indorsement on the summons. The summons gets the party into court. Its service gives jurisdiction of the party to the court. The party being thus in court, he must defend his rights and protect his interests, as is permitted by the rules of procedure. Most of the rights given to litigants by statute, and most of the safeguards thrown around them, may be thrown away if they choose so to do, or neglect to avail themselves of those provisions.

This court, in Simpson v. Rice, 43 Kan. 22, 22 Pac. 1019, strongly intimated that the view here taken was the correct one. We now follow that intimation, and hold that the judgment in the case of Tootle, Hanna & Co. against Ellis & Co. was not void, and hence, if for no other reason, the levy and sale of real estate under an execution to enforce it could not be enjoined: Dusenberry v. Bennett, 7 Kan. App. 123, 53 Pac. 82.

The judgment of the district court will be reversed, with instructions to proceed further in harmony with this opinion.

Smith and Ellis, JJ., concurring.

Relief in Equity Against Judgments is considered in the monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218-261. Equity cannot enjoin a judgment and grant a new trial because of a false return of service of process, unless it appears that if a new trial is granted a good defense will produce a different result: McClung v. McWhorter, 47 W. Va. 150, 81 Am. St. Rep. 785, 34 S. E. 740. See, in this connection, Smoot v. Judd, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854.

On the Vacation of Judgments for defects in the form and service of process, see the monographic note to Furman v. Furman, 60 Am. St. Rep. 645, 646. It is the fact of service, rather than the proof thereof, that gives a court jurisdiction: Bank of Orland v. Dodson, 127 Cal. 208, 78 Am. St. Rep. 42, 59 Pac. 584; Herman v. Santee, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509; Cunningham v. Spokane etc. Co., 20 Wash. 450, 72 Am. St. Rep. 113, 55 Pac. 756. The fact that the affidavit of service of summons does not state that the affiant was of the age required by statute does not render the judgment vulnerable to collateral attack: Burke v. Interstate Sav. etc. Assn., 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879.

POHLMAN v. DAWSON.

[63 Kan. 471, 65 Pac. 689.]

CONTRACT TO REFRAIN FROM BUSINESS.—WHERE A BARBER sells his business and contracts not to engage in such business in any manner in a certain town, he may subsequently be enjoined from carrying on such business, either as a proprietor or as an employé. (p. 250.)

L. B. Beardsley and W. G. Eastland, for the plaintiff in error.

George W. Holland, for the defendants in error.

471 SMITH, J. This was an action brought by plaintiffs below to enjoin the plaintiff in error from working at the barber trade in the town of Russell, in violation of the terms of a contract made by him with the plaintiffs. It is alleged in the amended petition that the parties entered into a written contract, a copy of which is set out, in which plaintiff in error, for adequate consideration, agreed as follows: "I, H. C. Pohlman, do hereby sell and assign all my right, title, and interest to the building now used by me as a barber shop, together with all furniture, tools, and materials in said shop, to G. F. Dawson. I also agree not to engage in the barber business in any manner in Russell, Kansas, while said G. F., E. E. or H. A. Dawson shall conduct the same."

472 The petition avers that at the time the action was brought Pohlman was working at the barber trade in Russell, Kansas, in a shop run by one Clarence Lester, in violation of the terms of the contract, to the great damage of plaintiffs; that he commenced work in said shop, in violation of his agreement, on or about the twenty-first day of July, 1898, and has worked ever since, and is now working, at said barber trade. The defendant below demurred to this petition on the ground that it stated no cause of action. His demurrer was overruled, and, electing to stand thereon, a perpetual injunction was decreed against him, and he comes here by proceedings in error.

The principal contention is that the plaintiff in error was not violating the terms of the contract in working for the proprietor of another shop. We disagree with counsel in this claim. The contract is that Pohlman should not engage in the barber business in any manner in Russell, Kansas. This means that he would not carry on said business after the manner

of either a proprietor or an employé. We think that by the comprehensive language used he contracted not to work as a barber for any other person in that town so long as defendants in error were in business. Engaging himself as an employé in a rival shop would result in greater harm to the defendants in error than if the parties had been carrying on a purely commercial business. The barber sustains personal relations with his customers, which are at least quasi professional. Formerly by statute, 32 Henry VIII, chapter 42 (5 Eng. Stats. at Large, 58), in England, barbers were united with a company of surgeons, it being enacted that they should confine themselves to the operations of bloodletting and drawing teeth. While a barber no longer practices surgery or extracts teeth, his vocation depends [478] for success on the skillful sharpening of his blade and the dexterity of its use. It differs essentially from a commercial pursuit. The patrons of a mercantile establishment are generally indifferent concerning the ability and experience of a clerk or proprietor whose dealings with them are chiefly confined to quoting prices and separating from the stock such quantities of goods as the customer buys. The owner may sell out to another and set up again for himself in the same business near by, yet purchasers find what is suitable to their wants still exposed for sale by the new proprietor at the old stand. Like the surgeon or dentist, when the barber moves he attracts to himself those having confidence in his ability, and the greater his professional skill the more difficult it is to alienate from him those to whom his services have given satisfaction.

The claim that the amended petition did not relate back to the time the action was commenced cannot be sustained. There is an express averment that it does so, and the verification states that the facts set out were true when the original petition was filed.

The judgment of the court below will be affirmed.

Cunningham and Ellis, JJ., concurring.

A Contract not to Practice a Profession in a particular place may be valid: McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; and a violation thereof may be enjoined: French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 18 Atl. 870. Compare Dills v. Doebler, 62 Conn. 366, 36 Am. St. Rep. 345, 26 Atl. 398; Herreshoff v. Boutineau, 17 R. I. 3, 33 Am. St. Rep. 850, 19 Atl. 712. A distinction exists between such a contract and a contract not to engage in business: Rakestraw v. Lanier, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735.

STATE v. STARK.

[63 Kan. 529, 66 Pac. 243.]

A CHANGE OF VENUE IS A WRONG TO THE PUBLIC, unless the interests of justice to the defendant require it, and the prejudice on the part of a judge must clearly appear. (p. 251.)

MISDEMEANORS.—ONE WHO IS PRESENT, ADVISING, COUNSELING OR ENCOURAGING the commission of a misdemeanor, is equally guilty with those actually committing the offense. (p. 252.)

IN MISDEMEANORS, ALL CONCERNED, IF GUILTY AT ALL, ARE PRINCIPALS. (p. 252.)

NUISANCE.—A PRIVATE PERSON WHO IS NOT SPECIALLY INJURED BY A COMMON NUISANCE in any other manner or degree than all other members of the community cannot maintain an action in his own name to abate the nuisance. (p. 253.)

NUISANCES—ABATEMENT.—ALTHOUGH BY STATUTE ALL PLACES WHERE INTOXICATING LIQUORS are sold for drinking as a beverage are declared to be common nuisances, yet this does not authorize or justify private persons in breaking into such places and destroying the liquors and the vessels in which they are kept. (pp. 252, 254.)

Galen Nichols, county attorney, for the state.

Troutman & Stone, D. H. Martin, and Thomas H. Bain, for the appellant.

[531] SMITH, J. The court did not err in overruling the application for a change of venue. The remarks of the judge were made to Carrie Nation and others in a proceeding to which the appellant was not a party. No personal prejudice toward Stark was shown. From all that appears, the judge might have been kindly disposed toward the defendant. The attack on Sunday, referred to by the judge, related to the conduct of other parties with whom the appellant was not connected. Had the language coming from the bench been directed to Stark, he might have had reason to complain. His case was not, however, before the court at that time. [532] It has been held that a change of venue is a wrong to the public, unless the interests of justice to the defendant require it, and that prejudice on the part of a judge toward a defendant must clearly appear. It is not sufficient that a prima facie case only be shown: City of Emporia v. Volmer, 12 Kan. 622, 627. The record shows that the district judge tried the case with fairness, and the punishment imposed was exceedingly moderate, considering that the maximum for such offenses is im-

prisonment in the county jail not exceeding one year, and fine not exceeding five hundred dollars, or both such fine and imprisonment.

The granting of a continuance was largely a matter within the discretion of the court. The offense charged was a misdemeanor. We do not think any of the rights of the defendant were prejudicially affected by the absence of attorneys who had prepared for the trial. He was represented by counsel of high standing and ability, and we find nothing in the record to indicate that any point favorable to him was overlooked. There was some confusion in the answers made by the juror Hale Ritchie touching his opinion of the guilt or innocence of the defendant, but his whole examination, taken together, does not show him to have been disqualified.

Complaint is made that several of defendant's witnesses, upon cross-examination, were subjected to rigid inquiries as to the existence of a certain organization formed for the purpose of destroying property. Nothing more was extracted by the state from such witnesses than the defendant himself confessed concerning such organization. He admitted that he was a member of a company which assembled on the statehouse steps and from there [533] moved to the place where the property in question was injured, and that he took an ax along because he thought he might be called on to use it. There was no error in the instruction that if the defendant was present, advising, counseling, or encouraging the breaking of the doors and windows, he was equally as guilty with those actually committing the offense, although he may not in person have injured said property. In misdemeanors, all concerned, if guilty at all, are principals: State v. Gurnee, 14 Kan. 111; Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497.

The appellant offered to prove that the prosecuting witness, at the time the trespass was committed and his property injured and destroyed, was the keeper of a place where intoxicating liquors were sold as a beverage in violation of law, and that the property in question was unlawfully used as an accessary thereto. This offer was rejected by the court and the testimony excluded. Upon this ruling the question arises whether, the owner of the property having employed it as an aid to the maintenance of a common nuisance, the appellant was justified in being a party to its destruction without process of law. Under our statutes all places where intoxicating liquors are sold, or where persons are permitted to resort for

the purpose of drinking intoxicating liquors as a beverage, or where such liquors are kept for sale, barter, or delivery in violation of the prohibitory liquor law, are declared to be common nuisances, and upon the judgment of a court having jurisdiction that such places are nuisances, the sheriff or constable or marshal of any city where the same are located shall be directed to shut up and abate such places, by taking possession thereof, and of all intoxicating liquors found therein, together with [534] all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisances, and the same shall be forthwith publicly destroyed by such officer. It is further provided that the attorney general, county attorney, or any citizen of the county where such a nuisance exists, may maintain an action in the name of the state to abate and perpetually enjoin it. Here is a complete legal remedy, easy to obtain, which was open to the appellant or any of his associates. Indeed, we believe it to be more drastic and summary in its application to the subject than the law of any other state in the Union.

The existence of such common or public nuisance as appellant offered to show was kept by the prosecuting witness, in violation of law, injuriously affected all other persons in the city of Topeka equally with himself. It is not claimed that he was specially injured, or peculiarly or individually hurt, in any other manner or degree than in common with all others in the community. He could not have maintained an action in his own name to abate the nuisance: Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243.

In the case of Brown v. Perkins, 12 Gray, 89, the supreme court of Massachusetts had before it a similar question. In an action of tort for breaking and entering the plaintiff's shop and carrying away and destroying a barrel of vinegar and other goods, the answer of the defendant alleged that the building was kept for the sale of intoxicating liquors and was a public nuisance; that a large number of persons assembled to abate the same and destroyed or injured no article of merchandise, but only spirituous liquor, unlawfully kept for sale, and did no other act, and used no more force, than was necessary to abate such nuisance. By statute in force in Massachusetts at that [535] time, all intoxicating liquors kept for sale, and the vessels and implements actually used in selling and keeping the same, were declared to be common nuisances and were to be regarded and treated as such. By another statute, all buildings or

tenements used for the illegal keeping or sale of intoxicating liquors were declared to be common nuisances. The trial court instructed the jury that intoxicating liquors kept for sale, with the vessels containing them and articles used in their sale, being declared by law to be a common nuisance, it was lawful for any person to destroy them by way of abatement, and that such action would be the exercise of a common and lawful right. This instruction was held to be erroneous. The opinion was delivered by Chief Justice Shaw, one of the ablest of American jurists, and we extract from it such portions as are most pertinent to the question before us: "It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance": Page 101.

"The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge across a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts [536] of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law": Pages 101, 102.

"The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children, or servants of any person do frequent such a place and get intoxicating liquor there does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold,

and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law": Page 102.

This enunciation of the law finds approval in all the textbooks upon the subject, so far as we have examined them: Wood on Nuisance, 3d ed., 966-968; Webb's Pollock on Torts, 515, and note. See, also, Corthell v. Holmes, 87 Me. 24, 32 Atl. 715. In Webb's Pollock on Torts, page 517, it is stated that in England the application of the remedy of abatement, by the forcible act of an individual, is now in use only as to rights of common, rights of way, and, sometimes, rights of water, "and even in those cases it ought never to be used without good advisement."

A fence across a public road is a common nuisance which a person journeying along the highway may legally abate by removing the obstruction. This is so because his progress is impeded and particular injury is sustained by him not shared in by the community generally. This right of abatement, however, cannot be lawfully exercised by one living at a distance from [537] the obstructed way, with no immediate occasion to use it, who goes out for the express purpose of removing the impediment in the interest of the traveling public, for fear that he or his neighbors might receive injury from it.

The appellant and his associates proceeded on the erroneous belief that because the prosecuting witness was a violator of the law they might right the wrongs the public was suffering by his acts, and this in a summary manner, by resort to physical force, guided only by the counsel of a mob. It was a congregation of lawbreakers on one side retaliating upon an individual lawbreaker on the other, for lawless acts of the latter which affected not them alone, but hundreds of others (the public), whom they assumed to represent. Courts of justice cannot approve or countenance such disregard of the law. To do so would create and encourage disrespect for all governmental restraint, which is the beginning of anarchy.

The judgment of the district court will be affirmed.

Johnston, Greene, and Ellis, JJ., concurring.

A Public Nuisance can be abated only by a public officer, except when the party who desires to abate it has some special interest in the abatement different from and greater than the rest of the community: Griffith v. Holman, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239; Knowles v. Pennsylvania R. R. Co., 175 Pa. St. 623, 52 Am. St. Rep. 860, 34 Atl. 974.

DOWNES v. BENNETT.

[63 Kan. 653, 66 Pac. 623.]

ACTIONS.—INJURIES REMOTELY AND INDIRECTLY ATTRIBUTABLE TO AN ORIGINATING CAUSE cannot be made the subject of a legal action. (p. 261.)

BOYCOTT.—A PLAINTIFF CANNOT ENJOIN A VOLUNTARY UNINCORPORATED ASSOCIATION from fining or expelling one of its members for his violation of a by-law of the association prohibiting him from trading with the plaintiff, or from trading with others who do trade with him, since the plaintiff is only affected in an indirect way. (pp. 261, 262.)

EQUITY DOES NOT GIVE A PRIVATE RIGHT OF ACTION to an individual for the doing of a wrongful act, merely because a statute has denounced the act as a crime. (p. 264.)

Hutchings & Keplinger, I. P. Ryland, and R. E. Ball, for the plaintiffs in error.

J. D. McCue and F. D. Mills, for the defendants in error.

653 DOSTER, C. J. This case has been twice argued, prior and subsequently to the increase of membership of the court under the recently adopted constitutional 654 amendment, and we have given to it much earnest thought. The case is a novel one, and its peculiar features have been given a complexity of appearance by the false light in which they first exhibited themselves. The question involved is really little more than one of mere practice. It is, Can a party plaintiff enjoin a voluntary unincorporated association from fining or expelling one of its members for his violation of a by-law of the association prohibiting him from trading on the market with the plaintiff, or from trading with others who do trade with him? In other words, Can a party aggrieved at the action of a voluntary association, which action, so far as direct effect is concerned, expends itself wholly on the members of the association, interfere in its internal management and discipline to prevent such action toward such members because of the indirect injurious effect it has on him, the aggrieved party? This question is not as much discussed by counsel as some others, but in our judgment it lies at the beginning point of all inquiry into the controversy, and therefore must receive first attention.

The facts of the case are that two voluntary unincorporated trading associations exist at Kansas City. One of them is called the "Traders' Livestock Exchange," the other the

"Farmers' Livestock Association." For convenience of designation we will speak of both of them as "associations." They were organized for the mutual benefit of their members, but as associations they do no business whatever. The members of each compete with one another as though no wise connected in their organization. The traders' association adopted and enforced two by-laws, or rules, reading as follows:

"Rule 10. This exchange will not recognize any yard trader unless he is a member of this exchange."

655 "Rule 15. All persons convicted of any violation of any of these rules shall be subject to fine, suspension, or expulsion, as recommended by the executive board."

The effect of the above rules was detrimental to the members of the farmers' association, because, as construed and enforced, they operated to deter members of the traders' association from doing business on the market with them, the members of the farmers' association, or doing business on such market with others who did business with the members of the latter association.

The members of the farmers' association thereupon instituted an action of injunction, in their individual names, against the members of the traders' association, in their individual names, to restrain them from the enforcement of the above-quoted by-laws, or any other like coercive rules, the effect of which might be to deter themselves or others from doing business on the market with the members of the farmers' association. In the petition for the injunction allegations were made that the purpose of the adoption and the effect of the enforcement of the rules were to close the cattle-market of Kansas City to the members of the farmers' association, and to monopolize it in the hands of the members of the traders' association; and allegations were also made that the adoption and enforcement of the rules had produced, as to the members of the farmers' association, in their business on the market, what is called a "boycott."

A trial of the case was had, findings of fact and conclusions of law were made, and a judgment of perpetual injunction rendered, as prayed for by plaintiffs. These findings, conclusions, and judgment were as follows:

"CONCLUSIONS OF FACT.

656 "1. The Kansas City stockyards is a public market, where livestock is sold to the person paying the agreed price therefor.

"2. That the cattle business of said stockyards is generally done by two classes of dealers in livestock—namely, 'commission men' and 'yard traders.'

"3. That the said commission men buy and sell cattle at said yards for others and charge a commission therefor, and do not buy or sell any cattle on their own account for profit.

"4. That said yard traders buy and sell cattle at said yards on their own account for profit, and do not buy or sell any cattle for others on commission.

"5. The said commission men belong to an association composed exclusively of commission men.

"6. That there are eighty concerns engaged at said yards in buying and selling cattle for others on commission.

"7. That said yard traders do not buy or sell fat cattle, but deal wholly in other classes of cattle.

"8. That about one hundred and eighty of said yard traders belong to the Traders' Livestock Exchange.

"9. That the said Traders' Livestock Exchange is an organization having for its officers a president, vice-president, secretary, and treasurer.

"10. That said Traders' Livestock Exchange has an executive committee consisting of eight members, who are appointed by the president with the approval of the exchange.

"11. That at the preliminary organization of said exchange the membership fee was fifty cents, which was raised to ten dollars at the permanent organization. Subsequently the membership fee was raised to two hundred and fifty dollars, and afterward to five hundred dollars, which is now the amount charged each person who now becomes a member of said exchange.

"12. The membership fee in said exchange was [657] not raised at any time because of any financial necessity therefor, but to deter irresponsible yard traders from making application for membership in said exchange, and to make the membership more valuable, in order that the penalty of expulsion for nonobservance of rules of the exchange would be more severe, and a better compliance with the rules be thus obtained, and to limit the membership of said exchange.

"13. That the defendants are members of said Traders' Livestock Exchange.

"14. That the members of said Traders' Livestock Exchange do ninety per centum of the business done by the said yard traders at said stockyards.

"15. That said Traders' Livestock Exchange was organized for the mutual benefit of its members, and as an organization does not deal in cattle or do any other business for profit.

"16. That it is the settled purpose of said Traders' Livestock Exchange, as an organization, to compel its members to cease and refuse to do any business with commission men who deal with a yard trader who is not a member of said Traders' Livestock Exchange.

"17. That in pursuance of that purpose members of said Traders' Livestock Exchange are notified by their executive board (which is the governing body of the said exchange) not to deal with a commission concern that has been found dealing with a yard trader who is not a member of said Traders' Livestock Exchange.

"18. That a member of said Traders' Livestock Exchange who does not obey said notice after having received it, but continues to deal with an offending commission concern is fined by said executive board, and if he does not pay his fine he is expelled from said exchange.

"19. That it is also the settled purpose of said Traders' Livestock Exchange, as an organization, to compel its members to cease and refuse to deal or to have cattle business connection with any yard trader [658] who is not a member of said Traders' Livestock Exchange.

"20. That in pursuance of that purpose members of said Traders' Livestock Exchange, when found dealing with such yard traders, have been and will be fined by the executive board of the said exchange.

"21. That said Traders' Exchange, in pursuance of its settled purpose, has, through its executive board, fined its members for trading with commission men who dealt with yard traders who were not members of said exchange.

"22. That the result of the members of said Traders' Livestock Exchange ceasing to do business with such commission concerns as had dealt with yard traders who were not members of said exchange was to withdraw from such commission concerns ninety per centum of their yard traders' business.

"23. That in every instance where the members of said Traders' Livestock Exchange ceased to do business with a commission firm, as above stated, the members of said exchange resumed business with said commission firm upon said commission firm ceasing to deal with yard traders who were not members of said Traders' Livestock Exchange.

"24. That the yard traders who were not members of the Traders' Livestock Exchange were materially injured in their business by not being able to freely deal with the commission men doing business at the stockyards and other yard traders who were members of said Traders' Livestock Exchange and who would have dealt with them but for said action of said executive board.

"CONCLUSIONS OF LAW.

"1. The members of the Traders' Livestock Exchange could, either individually or collectively, voluntarily cease doing business with any commission man or yard trader, for any reason whatsoever, without incurring any legal liability therefor.

"2. The action of the executive committee of the Traders' Livestock Exchange in compelling members [659] of said exchange, through fines, to cease doing business with either commission men or yard traders with whom they would otherwise have done business was illegal.

"3. The settled purpose of said Traders' Livestock Exchange to compel its members, or any of them, against their will, to cease and refuse to do business with commission men or yard traders, for whatsoever cause, is a combination to do injurious acts by way of restraint, coercion, and intimidation, and is therefore an unlawful purpose.

"4. That the defendant will be perpetually enjoined from, either directly or indirectly, by fine or expulsion from the Traders' Livestock Exchange, or otherwise, restraining, coercing, and intimidating any one or more of its members from dealing with or having business connection with any commission man or yard trader at the Kansas City stockyards who is doing or desires to do business with the plaintiffs or any of them.

"JUDGMENT.

"It is therefore ordered that the defendants, and each of them, members of the Traders' Livestock Exchange, be and they are perpetually enjoined and restrained from, either directly or indirectly, by fine or expulsion, or by threats of fine or expulsion, of the members of the Traders' Livestock Exchange, restraining, coercing, or intimidating any one or more of the members of the said Traders' Livestock Exchange from dealing with or having business connection with any commission man or yard trader at the Kansas City stockyards

who is doing or desires to do cattle business of any kind or character with plaintiffs."

To reverse the above judgment error has been prosecuted to this court.

The argument of the case was largely on the laws relating to what are called "trusts" and "monopolies," and those prohibiting what is called "boycotting," but the plaintiffs in error, the defendants below, [660] as their initial proposition, make the claim that the defendants in error, the plaintiffs below, have not shown that interest in the subject matter of the controversy which entitled them to sue. This claim we are constrained to think well taken. Let the fact be recalled, and stated again, that the plaintiffs below do not complain of any conduct of the defendants below directly operating upon or affecting them, but they complain of that which directly expends its force upon the defendants themselves, and which only reaches to the plaintiffs in an indirect way and as a secondary consequence.

It is a settled doctrine of the law that injuries remotely and indirectly attributable to an originating cause cannot be made the subject of a legal action. A direct and necessary connection must be traced backward along a line of sequences in order to establish the occurrence of effect from cause. This is most frequently instanced in the case of claims for damages for personal injuries for the violation of contracts, but the rule is general and applies as well to actions for preventive or other equitable relief as to actions at law for compensation. Suppose some member of the plaintiff association had sued the defendant association for damages for maliciously causing him to be "boycotted" in his business, and only proved the adoption and enforcement of the obnoxious by-laws above quoted—that and nothing more—could a recovery be had? Certainly not. In such case it would have been necessary to prove an actual loss of trade—prove that the public, or some one or more of it, who otherwise would have dealt with the plaintiff, failed, as a direct result of the wrongful act, to do so. Now, in this case, does it follow as a conclusion of fact which the law draws from the premises, that the members [661] of the defendant association would trade with the members of the plaintiff association but for the constraint of the by-laws in question? Does it follow in the order of causation that if the by-laws should be repealed a channel of trade would be opened up between plaintiffs and defendants,

as the removal of an obstruction from a stream would start the flow of its water? Certainly not. It might do so, but the law does not know as a fact that it would have that effect; and the law is therefore powerless to grant the relief asked, because it cannot render its judgments on a mere conjecture of their efficacy. When one is engaged in business and a number of persons conspire to slander, and do slander, the merchantable quality of his goods, or conspire to seduce, and do seduce, his employés to leave his service, or conspire to repel, and do repel, his customers by obstructing the passage to his doors, the law perceives the connection between act and consequence, and it gives relief, preventive or compensatory, as it may be able; but it is not possible for it to perceive the same character of connection in the case of a number of persons who merely agree, under penalties, not to have dealings with another, because it does not follow as a consequence that the nonenforcement of the penalties, or even the abrogation of the agreement, would restore the injured person to favor.

Nor can the law, lacking ability to perceive a causal connection between the enforcement of the by-laws in question in this case and the claimed injurious consequence, open up an avenue of proof by which the injury may be shown. How can the plaintiffs prove that the defendants would trade with them, were the latter not fearful of fine or expulsion from their association? They might prove that upon the [663] removal of the restrictive influences the defendants would trade generally on the market; but how can they prove that, among the hundreds of dealers on the market and the hundreds of daily transactions they have among themselves, an appreciable share of the denied trade would fall to them?

The defendants are not under contract to trade with plaintiffs, nor is it claimed that the making of a contract is desired by any of the parties, and that the enforcement of the by-laws operates to prevent the agreement. This is not the case of a union or association of persons intimidating its members from engaging in a specific service offered by an employer, and standing ready and open to be entered. In such cases, on a showing of continuing damage caused by inability to secure employés, preventive relief has been afforded. In this case, however, every element of injury lying at the base of plaintiffs' claim is indirect, remote, and conjectural, and

our judgment, therefore, is that the relief asked cannot be allowed.

A great array of decisions has been marshaled before us, but nearly all of them bear on the question whether the defendant association is a monopoly, or whether its acts tend to monopoly. They also bear on the question whether the acts of the defendant association are in pursuance of a conspiracy to boycott the plaintiff in business. It was not difficult to make a showing of applicability of these decisions, because at first glance it would seem that the case required a consideration of the law relating to the subjects of boycotting and monopoly—one and, perhaps, both; but upon most careful reflection we are constrained to think that only the narrower question of interest of the plaintiffs in the subject matter of the action is involved. There are no authorities bearing directly on the precise subject. The point involved is therefore one of first impression.

The case most nearly similar to it is Russell v. New York Produce Exchange, 27 Misc. Rep. 381, 58 N. Y. Supp. 842. There the plaintiffs, who were not members of the exchange, sought to enjoin it from posting a notice declaring them guilty of certain charges, and also from prohibiting its members from representing and acting for them on the floor of the exchange. The relief asked was denied for reasons of a nature similar to those advanced by us in this case. Another decision somewhat supportive of the claim of lack of interest to maintain the action is Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119. A case inclining somewhat toward the opposite view is Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607; but in reality none is sufficiently like the present one in point of fact to be especially helpful.

Nor do any of the statutes of this state aid the contention of the defendants in error, the plaintiffs below. We have many statutory provisions condemnatory of what are called "trusts" and "monopolies," but none of them gives a right of action in equity to individuals who do not on general equitable principles already possess it. For instance, section 2 of chapter 158 of the Laws of 1891 contains the following provision: "And it shall be unlawful for any person or persons or corporation or corporations doing business in this state to be or become a member of any society, association, or corporation whose by-laws provide for and fix the minimum commission

for the selling of livestock for others, or whose by-laws prohibit its members from purchasing livestock from persons who are not members of such society, association, or corporation," etc.: Gen. Stats. 1901, sec. 2440.

664 This statute would seem to interdict membership in the defendant association, as long as it maintains the obnoxious by-laws in question, but it is entirely penal in character, as will be observed by its further reading. Its provisions are enforceable only by criminal prosecution. Equity does not give a private right of action to an individual for the doing of a wrongful act, merely because the statute has denounced the act as a crime. The enactment of a statute for the suppression of a public wrong does not vest in the individual a right of action to suppress it. If beforehand he had a right of action, the statute, when enacted, may illustrate or enlarge or strengthen it, but it does not give it, wholly and alone. Our conclusion is that the plaintiffs below have not shown any interest in the subject matter of the action, nor do the findings of the court show that they possess any interest in it.

The judgment of the court below is therefore reversed, with directions to enter judgment on the findings in favor of the defendants.

Injunctions against the expulsion of members of associations and societies are considered in the monographic note to Robinson v. Templar Lodge, 59 Am. St. Rep. 198-200. On the jurisdiction of equity generally over voluntary unincorporated societies, see the monographic note to Kearnes v. Hawley, 68 Am. St. Rep. 856-871.

Unlawful Trade Combinations and trusts are considered in the monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 235-273. For recent cases on boycotting, see Ertz v. Produce Exchange, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. W. 737; Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607.

DEMING INVESTMENT COMPANY v. DICKERMAN.

[68 Kan. 728, 66 Pac. 1029.]

JUDICIAL SALES—INSURANCE.—A CONTRACT OF INSURANCE upon property sold at a foreclosure sale between the purchaser and an insurance company is a personal contract of indemnity between such purchaser and the company alone, which does not inure to the benefit of the party entitled to redeem, and the purchaser, having collected the insurance money after the property has been destroyed by fire, is under no obligation to account for it to such redemptioner. (p. 266.)

Nelson Case, for the plaintiff in error.

E. B. Morgan and S. J. Mattox, for the defendant in error.

728 POLLOCK, J. The defendant in error, owner of an improved lot in the city of Oswego, mortgaged it to plaintiff in error, which mortgage was transferred to the Perkeoman Trust Company. Upon default in payment the trust company foreclosed the mortgage, the decree providing for sale, subject to eighteen months' redemption, as provided by law. At the foreclosure sale, the Deming Investment Company, plaintiff in error, purchased the property and received a certificate of purchase thereon. Thereafter, the investment company applied for, received and paid 729 for a policy of insurance on the building situate upon the property. The building was wholly destroyed by fire and the insurance thereon paid to the investment company. Thereafter, and within the period allowed by law, the defendant in error redeemed from the foreclosure sale and brought this action to recover from the investment company the money received by it from the insurance company. At the trial plaintiff had judgment. The investment company brings error.

From the facts as stated, taken from the agreed statement of facts found in the record, there arises in this case no question as to the validity of the contract of insurance between the investment company and the insurance company; no question as to the insurable interest of the investment company in the property. The only question presented for determination is, Who was entitled to the sum of money realized upon the policy of insurance?

It will be perceived that this is not a case in which the insurance was procured by virtue of an agreement between a mortgagor and mortgagee, contained in the mortgage or other-

wise, by which the premium paid became a lien on the mortgaged property or a personal liability of the mortgagor. In this case the investment company, the purchaser at the foreclosure sale, made application, procured and paid for the policy of insurance on the property to protect itself against the loss of its interest in the property from fire. In such case it is well settled, both upon principle and by the authorities, that the contract of insurance is a personal contract of indemnity between the purchaser and the insurance company alone, which does not inure to the benefit of the party entitled to redeem, and in which he can claim no interest whatever; [730] and the purchaser, having collected that which he has purchased and for which he has paid, is under no obligation to account for it, either by reduction in the amount necessary to redeem or to the redemptioner: Cushing v. Thompson, 34 Me. 496; McIntire v. Plaisted, 68 Me. 363; 16 Am. & Eng. Ency. of Law, 2d ed., 844; Jones on Mortgages, 2d ed., sec. 240; May on Insurance, sec. 456; King v. State Mutual Fire Ins. Co., 61 Mass. 1, 54 Am. Dec. 683.

It follows that the judgment must be reversed and the case remanded, with directions to enter judgment in favor of defendant upon the agreed statement of facts.

Cunningham and Greene, JJ., concurring.

Insurance.—A mortgagor has no claim to an insurance effected by the mortgagee on his own account, without any agreement therefor between the parties. Such a contract of insurance is distinct from the mortgage, and there is no privity between the mortgagor and mortgagee with respect to it: See the monographic note to King v. State etc. Ins. Co., 54 Am. Dec. 696. Consult, in this connection, Capital City Ins. Co. v. Jones, 128 Ala. 361, 86 Am. St. Rep. 152, 30 South. 674; Whiting v. Burkhardt, 178 Mass. 535, 86 Am. St. Rep. 503, 60 N. E. 1.

HOWARD v. HULBERT.

[63 Kan. 793, 66 Pac. 1041.]

STATUTES, REPEAL OF.—THE RULE THAT A GENERAL LAW DOES NOT BY IMPLICATION REPEAL A SPECIAL ACT is only a rule of construction, and must yield when there appear in the general act reasons sufficient to lead to the conclusion that a repeal of the special act was intended. (pp. 268, 269.)

STATUTES, REPEAL OF.—THAT A GENERAL STATUTE IS COUCHED IN NEGATIVE TERMS makes it more indicative of the legislative purpose to have it replace all other statutes upon the subject. (p. 270.)

STATUTE—REPEAL BY IMPLICATION.—THE RULE THAT WHERE TWO STATUTES ARE, IN BOTH LANGUAGE AND MEANING, IRRECONCILABLY REPUGNANT, the provisions of the one last enacted repeal, by implication, those of the former with which they conflict, applies to a general act and a prior special act. (p. 270.)

John C. Douglass, for the plaintiffs in error.

F. P. Harkness and Dawes & Wulfekuhler, for the defendant in error.

793 CUNNINGHAM, J. This was an action in ejectment, based upon a tax deed issued in 1895 by the county clerk of Leavenworth county. The defendants contended that the deed was void because the tax levy of 1890, upon which the sale was based, exceeded the power of the county commissioners.

794 Section 181 of chapter 25 of the General Statutes of 1868 provided: "In counties where the taxable property is less than five millions of dollars, the board of county commissioners shall not levy a tax for the current expenses of any one year of over one per cent on the dollar of such valuation; and in counties where the taxable property is five millions of dollars or upward, the tax for such purposes shall not exceed one-half of one per cent upon such valuation in any one year, unless by a direct vote of the electors of the county."

In 1879 a special act of the legislature was passed authorizing the county commissioners of Leavenworth county to levy upon all taxable property in the county for the year 1879, and for each subsequent year, for current expenses, five and one-half mills on the dollar. The law remained in this condition until 1885, when section 181 of chapter 25 of the General Statutes of 1868, was amended by an act (Laws 1885, c. 110; Gen. Stats. 1901, sec. 1853), the title and body of which are follows:

"An act to amend an act entitled 'An act relating to counties and county officers,' being chapter twenty-five of the General Statutes of eighteen hundred and sixty-eight, and to repeal section one hundred and eighty-one thereof.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. That section one hundred and eighty-one of chapter twenty-five of the General Statutes of eighteen hundred and sixty-eight be amended so as to read as follows: Sec. 181. The board of county commissioners of any county shall not levy upon the taxable property of such county a tax for current expenses of said county of any one year in excess of the following amounts: Upon a valuation of five million dollars and under, one per cent; over five millions and under six millions, eight and one-half mills; over six millions and under seven millions, seven and [795] one-half mill; over seven millions and under eight millions, six and one-half mills; over eight millions and under nine millions, five and three-fourths mills; over nine millions, one-half of one per cent; provided, that the electors of the county, by a direct vote, may order an increase in such levies.

"Sec. 2. That original section one hundred and eighty-one of chapter twenty-five of the General Statutes of eighteen hundred and sixty-eight be and the same is hereby repealed."

This act was incorporated into chapter 25 of the General Statutes of 1889, and was the general law in force in 1890, at the time of the levy for which the land in question was sold. The levy in question was greater than one-half of one per cent for current expenses, and Leavenworth county had more than nine millions of taxable property.

The question involved in this discussion is which law governed in the matter of the levy of the tax of 1890 in Leavenworth county, the special act of 1879 or the general law of 1885. If the latter, then the levy was in excess of that authorized by law, and the tax deed was void when attacked as it was. More specifically to state it, Did the general law of 1885 repeal, by implication, the special act of 1879? The court below held that it did not, and that the tax deed under which the defendant in error claimed was good, and directed judgment in his favor.

The books unquestionably lay it down as a general rule that a general law does not by implication repeal a special act; and the argument in support of this rule is that, where the mind of the legislator has been turned toward the details of

a subject and has acted upon it, any subsequent general legislation must be construed and applied with reference to, and in the light of, the special matters already provided for. [796] This rule comes to us with our common law. Greater reason for it manifestly exists under the English system, so largely of private grants and provisions, than under ours, more specifically hedged about with constitutional limitations; but, at best, the rule is only one of construction, and is not invariable or unchangeable; it must yield when there appear in the general act reasons sufficient to lead to the conclusion that the legislature intended the general act to be of universal application, notwithstanding the prior special one. It is stated in Endlich on the Interpretation of Statutes, section 230: "If there be in the act, or in its history, something showing that the attention of the legislature had been turned to the earlier special act, and that it intended to embrace the special cases, within the general act (and such an intent may be inferred from the fact that the provisions of the two acts are so glaringly repugnant to and radically irreconcilable with each other as to render it impossible for both to stand), something in the nature of either act to render it unlikely that any exception was intended in favor of the special act, the maxim under consideration ceases to be applicable."

In Sutherland on Statutory Construction, section 157, the rule is stated as follows: "It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special or local, unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal."

Applying these rules, is it not clear that the legislature intended to make the act of 1885 apply to all counties? The General Statutes of 1868 contained a general rule, not so explicit in statement as [797] the act of 1885, perhaps, and that general rule has been modified by later special statutes as to some of the counties; but in 1885 the legislature, after a trial of the system of specialized levies, different in different counties but responsive to no general rule, concluded to do away with this miscellaneous and specialized method, and enacted a law which, while recognizing the needs of different counties, should do so on a general principle, and so it said: "The board of county commissioners of any county shall not

levy," etc. What could more strongly indicate the legislative purpose to include all of the counties of the state? To make it do less we must read into it an exception which would do violence to the positive terms of the statute. Then, to show that all of the counties were in the legislative mind, the act goes on to catalogue them into six classes and fit a rate of taxation to the needs of each. After all this particularity and this absolute prohibition upon the commissioners of any county to exceed the levy set down for their particular county, the courts may not say that this legislative command is of no force.

It will be noted further that this general statute is couched in negative terms, which, under the rule quoted from Sutherland, supra, makes it more indicative of the legislative purpose to have it replace all others upon this subject.

There is another consideration which we think ought to have weight. Section 17 of article 2 of the constitution provides that "all laws of a general nature shall have a uniform operation throughout the state," and we think the court ought to assume, at least in the absence of inherent evidence to the contrary, that the legislature, in enacting a general law purporting to be of general application, did so in view [798] of this provision of the constitution, and intended it to have such general application, and intended thereby to substitute it for all prior laws, special as well as general. We do not overlook the rule that repeals by implication are not favored, but we are equally well aware of the rule "that where two statutes are in any respect, in both language and meaning, irreconcilably repugnant, the provisions of the statute last enacted repeal those of the former, with which they conflict": Elliott v. Lochnane, 1 Kan. 125. We hold that this rule applies as well between a general and a special act as between two general ones: State v. Pearcy, 44 Mo. 159; Willing v. Bozman, 52 Md. 44; Bowyer v. Camden, 50 N. J. L. 87, 11 Atl. 137; Hoetzel v. East Orange, 50 N. J. L. 354, 12 Atl. 911. That the two acts are repugnant we may not doubt: Bartlett v. Atchison etc. R. R. Co., 32 Kan. 134, 4 Pac. 178.

We conclude that the general act of 1885 repealed the special act of 1879, and that the tax levy in Leavenworth county for 1890, being in excess of the amount the commissioners were authorized to levy, the sale of the real estate in question for the delinquent taxes was unauthorized, and the deed based thereon void, when attacked as this was, and, therefore,

that the court erred in rendering judgment for the plaintiff thereon.

The judgment of the district court will be reversed, and the case remanded for further proceedings.

Greene and Pollock, JJ., concurring.

THE REPEAL OF STATUTES BY IMPLICATION.

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The cases which have arisen upon the question of the repeal of statutes by implication have been very numerous. The principles involved are, however, fairly well settled, and many of the cases are but a mere repetition of some doctrine already determined. For this reason it will be unnecessary to consider in detail the facts of all the cases which have arisen, and this note will be confined to a full discussion of the doctrines involved, with sufficient illustration to render the treatment clear.

II. General Principles.

a. **Rule of Construction.**—Whether a new act works a repeal of an existing statute is a question of legislative intention: United States v. Claflin, 97 U. S. 546; State v. White, 49 La. Ann. 127, 21 South. 141. It must appear that the legislature intended to abrogate the earlier statute, or no repeal will result: Waterworks Co. v. Burkhart, 41 Ind. 364; Pacific R. R. Co. v. Cass County, 53 Mo. 17. The question being one of intention, where the legislative intent appears it must prevail: State v. Severance, 55 Mo. 378. But the intention to change a prior law should clearly appear, before the presumption is indulged that such a change has been produced: Lee v. Forman, 3 Met. (Ky.) 114. An act cannot be repealed by implication unless the implication necessarily follows from the language used: Pratt v. Atlantic etc. R. R. Co., 42 Me. 579. It has been said that the language used in the subsequent act should be equivalent to an express repeal: Cole v. Board of Supervisors, 11 Iowa, 552.

The acts must be harmonized if possible, and to this end the latter act should be construed so as not to operate as a repeal of the former, if such a construction can be gathered: Blain v. Bailey, 25 Ind. 165. If a reasonable construction will enable both acts to stand, this should be adopted: In the Matter of the Evergreens, 47 N. Y. 216. And the courts will seek for such a construction, especially where both statutes are affirmative in their terms: Fowler v. Pirkins, 77 Ill. 271. If, when read together, the acts are not so inconsistent but that both might stand and be given effect, no repeal by implication will result: Kilbourne v. Supervisors, 62 Hun, 210, 16 N. Y. Supp. 507. While, if they are so inconsistent and contrary that both cannot stand, the latter will abrogate the former: State v. Blake, 35 N. J. L. 208. In either case it is the supposed intention of the legislature, as gathered from the language of the statute, that governs: See People v. Palmer, 52 N. Y. 83.

b. **Necessity of Repealing Clause.**—The fact that an act does not contain either a general or specific repealing clause will not prevent it from repealing a prior inconsistent act by implication: State v. Moore, 48 Neb. 870, 67 N. W. 876. Most of the statutes, however, contain a general clause repealing all acts inconsistent therewith. Where the repealing clause expressly repeals a portion

of a prior act the remainder of the act will not usually be repealed by implication: Pursell v. New York Life Ins. etc. Co., 10 Jones & S. 383. For this raises an implication that no further repeal is necessary, unless there is an absolute inconsistency between other provisions of the two statutes: People v. Henwood, 123 Mich. 317, 82 N. W. 70; State v. Morrow, 26 Mo. 131. There can be no repeal by implication where the act expressly provides that prior acts shall continue in force: San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720. An erroneous recital of what sections of an act are repealed will not repeal such sections, but the sections intended, where the intention can be ascertained from the title and provisions of the act: State v. Pierce, 51 Kan. 241, 32 Pac. 924.

c. **Repeals by Implication not Favored.**—The rule is firmly settled that repeals by implication are not favored: Horton v. Mobile School Commrs., 43 Ala. 598; Conner v. Southern Exp. Co., 37 Ga. 397; Board of Supervisors v. Campbell, 42 Ill. 490; People v. Barr, 44 Ill. 198; McGillen v. Wolff, 83 Ill. App. 227; Blain v. Bailey, 25 Ind. 165; People v. San Francisco etc. R. R. Co., 28 Cal. 254; State v. Berry, 12 Iowa, 58; State v. Brown, 48 La. Ann. 1569, 21 South. 143; Kerlinger v. Barnes, 14 Minn. 526; Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822; Naylor v. Field, 29 N. J. L. 287; Robinson v. Goldsboro, 122 N. C. 211, 30 S. E. 324; Buckingham v. Steubenville etc. R. R. Co., 10 Ohio St. 25; Richards v. Patterson, 30 Miss. 583.

It is presumed that the legislature was familiar with prior legislation, and that if it intended to repeal existing laws it would have expressly done so: Horton v. Mobile School Commrs., 43 Ala. 589. Hence, if by any fair and liberal construction, two acts may be made to harmonize, no court is justified in deciding that the last repealed the first: Conner v. Southern Exp. Co., 37 Ga. 397. And, though statutes are seemingly repugnant they should, if possible, be so construed that the last will not operate as a repeal, by implication, of the former ones: People v. Barr, 44 Ill. 198. If the statutes can be reconciled in any way, this should be done: Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; so that both may stand together: Chamberlain v. Chamberlain, 43 N. Y. 424. A repeal by implication is accomplished only where there is a positive repugnancy between the two acts: McGillen v. Wolff, 83 Ill. App. 227; Board of Supervisors v. Campbell, 42 Ill. 490; McCartee v. Orphan Asylum, 9 Cow. 437, 18 Am. Dec. 516; Robbins v. State, 8 Ohio St. 131; State v. Woodside, 9 Ired. 496. The repugnancy must be necessary and obvious: Buckingham v. Steubenville etc. R. R. Co., 10 Ohio St. 25.

In Zickler v. Union Bank, 104 Tenn. 277, 57 S. W. 341, it was held that repeals by implication were not favored especially as applied to statutes relating to revenue and collection.

d. **Laws Must have the Same Object.**—In order that one statute shall repeal another by implication, it is necessary that the

purpose and objects of the two statutes should be the same: United States v. Claflin, 97 U. S. 546. They must both relate to the same subject and have the same object or purpose: Eagan v. City of Rochester, 68 Hun, 331, 22 N. Y. Supp. 955; Baca v. Board of Commrs. (N. Mex., Aug., 1900), 62 Pac. 979. If the object of the later act is different, there is no repeal, though both relate to the same subject: United States v. Claflin, 97 U. S. 546. Where the object to be accomplished by an act is stated, and this differs from the purpose of a prior act, no repeal by implication will result: State v. Morrow, 26 Mo. 131. The same is true where the evils which a later act are designed to remedy differ from those for which a prior act provided: State v. Rieger, 59 Minn. 151, 60 N. W. 1087. So the re-enactment of certain provisions of an act, in a subsequent act providing a wholly different scheme, will not, by implication, work a repeal of those provisions in the first act: Powers v. Shepard, 48 N. Y. 540.

e. Inconsistency and Repugnancy.

1. Necessity Therefor.—Courts will not construe a prior act to be repealed by implication by a subsequent act, unless the provisions of the latter are directly repugnant to the former. The two acts must be inconsistent with and repugnant to each other: George v. Sheates & Co., 19 Ala. 738; Morlot v. Lawrence, 1 Blatchf. 608, Fed. Cas. No. 9815; United States v. Barr, 4 Saw. 254, Fed. Cas. No. 14,527; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Mullen v. People, 31 Ill. 444; Board of Commrs. v. Potts, 10 Ind. 286; Ament v. Humphrey, 3 G. Greene, 255; Elliott v. Lochnane, 1 Kan. 126; Planters' Bank v. State, 6 Smedes & M. 628; State v. Macon County Court, 41 Mo. 453; Mayor v. Jersey City etc. R. R. Co., 20 N. J. Eq. 360; McLaughlin v. Hoover, 1 Or. 31; Johnston's Estate, 33 Pa. St. 511; State v. Taylor, 2 McCord, 483; Attorney General v. Brown, 1 Wis. 513; Forqueran v. Donnally, 7 W. Va. 114; Albert v. Twohig, 35 Neb. 563, 53 N. W. 582; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; Iverson v. State, 52 Ala. 170; McGillen v. Wolff, 33 Ill. App. 227; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210.

The two acts must be so repugnant that they cannot stand together or be consistently reconciled: Morlot v. Lawrence, 1 Blatchf. 608, Fed. Cas. No. 9815. The repugnancy or opposition must be too clear and plain to be reconciled: Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447. As is said in some of the cases, there can be no repeal unless the repugnancy is plain and unavoidable: Planters' Bank v. State, 6 Smedes & M. 628; Forqueran v. Donnally, 7 W. Va. 114; Albert v. Twohig, 35 Neb. 563, 53 N. W. 582.

The acts must be so clearly repugnant as to imply a negative: McLaughlin v. Hoover, 1 Or. 31. The repugnancy must be plain, unavoidable, and irreconcilable: Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306.

And the court, in Iverson v. State, 52 Ala. 170, said that the two acts must be directly antagonistic and repugnant. There must be such a positive repugnancy as to admit of no other reasonable construction: McGillen v. Wolff, 83 Ill. App. 227; West Chicago Park Commrs. v. Brenock, 18 Ill. App. 559. Hence, there must be an irreconcilable repugnance between the statutes: Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Elliott v. Lochnane, 1 Kan. 126; so that both cannot stand together and be executed: State v. Howe, 28 Neb. 618, 44 N. W. 874.

It must be clear, however, that there is an inconsistent repugnancy between the two statutes, for, if they are susceptible of a construction which will render both operative, without doing violence to either, the courts will, if possible, give them such a construction: Attorney General v. Brown, 1 Wis. 513. And see the cases already cited, all of which recognize this rule as firmly established. The test whether one statute effects the repeal of another by implication is, Does the subsequent act become so directly and positively repugnant to the former act that the two cannot consistently stand together? Starbird v. Brown, 84 Me. 238, 24 Atl. 824. The presumption is always against the intention to repeal one statute by another where express terms are not used. And, if by any fair and reasonable construction they can be reconciled, both must stand: Fulkerson v. Bristol, 95 Va. 1, 27 S. E. 815. This is why the courts employ such strong language in insisting that the conflict shall be irreconcilable. Thus, in Buckingham v. Steubenville etc. R. R. Co., 10 Ohio St. 25, it was said that a repeal by implication "will not be recognized unless the repugnancy between the prior and subsequent act of legislation be necessary and obvious, and so great that the two cannot be reconciled by any fair course of reasoning." The fact that the later act is different from a former one is not sufficient to work a repeal. The fact that it covers part or all of the provisions of a former act may not effect a repeal, since it may be merely cumulative or auxiliary to the former: University of Utah v. Richards, 20 Utah, 457, 77 Am. St. Rep. 928, 59 Pac. 96. Where a later act creates an exception, there is no such repugnancy as will effect a repeal of a prior act: Ex parte Smith, 40 Cal. 419. A repugnancy in principles merely forms no reason why both acts may not stand: Ex parte Smith, 40 Cal. 419.

Where the two acts are not manifestly inconsistent with and repugnant to each other, both will be enforced: In re Mitchell, 120 Cal. 384, 52 Pac. 799; State v. Moore, 48 Neb. 870, 67 N. W. 876; Murray v. State, 112 Ga. 7, 37 S. E. 111. This is true though they relate to the same subject: Allen v. Salem, 10 Ind. App. 650, 38 N. E. 425. The repeal of an act cannot be implied from the mere fact that some of the evils provided against are subsequently removed: Mayor v. Dearmon, 2 Sneed, 104.

2. Effect.—If a later act is repugnant to and irreconcilable with a prior act, effect must be given to such later act, and the earlier

will be repealed by implication: Starbird v. Brown, 84 Me. 238, 24 Atl. 824; State v. Northern Cent. Ry. Co., 90 Md. 447, 45 Atl. 465; State v. Magney, 52 Neb. 508, 72 N. W. 1006; State v. Halliday, 63 Ohio St. 165, 57 N. E. 1097. But, if the acts are not inconsistent and can be harmonized, no repeal will result: Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Frostburg Min. Co. v. Cumberland etc. R. R. Co., 81 Md. 28, 31 Atl. 698; People v. Fuller, 41 App. Div. 404, 58 N. Y. Supp. 835. A later law which is merely the re-enactment of a former one does not repeal an intermediate act which has qualified or limited the first one. Such intermediate act will be deemed to remain in force, and to modify the new act in the same manner as it did the first: Powell v. King, 78 Minn. 83, 80 N. W. 850.

When two acts on the same subject are repugnant, the latter operates to repeal the former to the extent of the repugnancy: District of Columbia v. Hutton, 143 U. S. 18, 12 Sup. Ct. Rep. 369; Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367; Mersereau v. Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; State v. Halliday, 63 Ohio St. 165, 57 N. E. 1097. But the repeal extends so far, and only so far, as the provisions of the latter act are repugnant to those of the earlier: Board of Commrs. v. Aetna Life Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Connors v. Carp River Iron Co., 54 Mich. 168, 19 N. W. 938. In other respects the original law is left in full force and effect: Trustees v. Trenton, 30 N. J. Eq. 667; Worthington v. Coward, 114 N. C. 289, 19 S. E. 154. See Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431.

3. **Examples.**—The citation of some illustrative cases as to when statutes are inconsistent and when they are not will make more clear the application of the principles we have been discussing.

A statute, in order to effect a repeal of another by implication, must be on the same subject, have been passed for the same purpose, and be inconsistent with and repugnant to the earlier act. All these matters must, therefore, be taken into consideration in determining whether a repeal by implication takes place. Hence, an act intended to relate to acts done in connection with an entry of goods at the custom-house does not repeal an act relating to cases where no attempt is made to enter the goods or otherwise comply with the laws respecting the collection of duties. Their purpose is not the same, and they are not repugnant to each other: United States v. A Lot of Jewelry, 59 Fed. 684. An act authorizing married women to sue alone does not, by implication, repeal the saving clause in their favor in a statute of limitations: Fox v. Drewry, 62 Ark. 316, 35 S. W. 533; Biller v. Boswell, 9 Wyo. 57, 59 Pac. 798. Where the only inconsistency between two acts is as to the time within which tax titles must be assailed and the amount to be paid to a purchaser before he can be evicted, the latter repeals the former only to this extent: Coats v. Hill, 41 Ark. 149. An act authorizing the widening of streets

is not repealed by an act relating to improvements upon existing streets, and which does not authorize the widening of streets: San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720. A special statute referring to the special subject of compensation of members of the board of education is not repealed by a special act amending the county government act, which does not refer to that subject: Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900. A law changing and regulating the method of assessment does not repeal a law prescribing a remedy for an illegal assessment: Shear v. Commissioners, 14 Fla. 146.

An act exempting farm lands included within the limits of a city from taxation for municipal purposes is not repealed by an act which gives the common council power to collect an ad valorem tax on all property within such city: Blain v. Bailey, 25 Ind. 165. But, a constitutional provision which provides that all taxes shall be uniform, and, if not exempted from taxation by the constitution, that property shall be assessed at its fair cash value, repeals a prior act exempting farm lands from municipal taxation: Louisville etc. R. R. Co. v. Barboursville, 20 Ky. Law Rep. 1105, 48 S. W. 985.

A statute which reserves to the widow and children of a person dying intestate the same property as was then exempt from sale under execution is not repealed by an act repealing the exemption statute: Graves v. Graves, 10 B. Mon. 31. An act imposing a tax on the keepers of coffee houses is not repealed by an act to provide for the assessment and collection of taxes: Albert v. Brewer, 9 La. Ann. 64. An act giving the mayor and aldermen of a city the exclusive right to grant licenses to sell liquors is not repealed by an act requiring that no license shall be granted unless the application is approved by a majority of the legal voters in the city: House v. State, 41 Miss. 737. A statute authorizing a proceeding to contest a will by bill in chancery is not abrogated by the provisions of a later act regulating the jurisdiction of the probate court, and authorizing a proceeding to contest a will by petition to the court of common pleas: Randebaugh v. Shelley, 6 Ohio St. 307. One attachment act is not repealed by a subsequent act on the same subject, except in so far as they conflict: Winter v. Norton, 1 Or. 42. An act relating to the sale of land for taxes, and which applies to real estate returned and registered, is not repealed by a later act which can, with propriety, be restricted to real estate which has not been returned and registered: Safe Deposit etc. Co. v. Fricke, 152 Pa. St. 231, 25 Atl. 530. An act making the sale of cigarettes a misdemeanor is not repealed by an act imposing a privilege tax on dealers in such articles. The former is an exercise of the police power; the latter an exercise of the taxing power, and does not, in any way, sanction, authorize, or countenance the business: Blanfield v. State, 103 Tenn. 593, 53 S. W. 1090. Compare Rutherford v. State, 39 Tex. Cr. Rep. 137, 45 S. W. 579. A statute which refers to and adopts the provisions of another statute is not repealed by the

subsequent repeal of such other statute: Sika v. Chicago etc. Ry. Co., 21 Wis. 370.

A statute abolishing probate courts and conferring their probate jurisdiction upon circuit courts impliedly repeals an act allowing an appeal from probate courts to circuit courts: Hogane v. Hogane, 57 Ark. 508, 22 S. W. 167.

An act authorizing a chancellor, judge, or register, to require a complainant to give a bond before a receiver is appointed, repeals by implication a prior act in so far as the latter act made the requiring of such bond discretionary: David v. Levy & Sons, 119 Ala. 241, 24 South. 589. A proclamation, on July 20, 1865, by the provisional governor of Alabama, that the laws of Alabama as they existed January 11, 1861, except as relates to slavery, were in full force and effect, repealed the laws passed by the Alabama legislature between those two dates: Jeffries v. State, 39 Ala. 655. An act prohibiting the licensing of toll-bridges over navigable streams is repealed by a later act expressly conferring such power: Chico Bridge Co. v. Sacramento Tr. Co., 123 Cal. 178, 55 Pac. 780. Where two acts exist for the assessment and collection of taxes, in which both the rate of assessment and the time of posting notice are different, the acts are repugnant and the latter prevails: People v. Burt, 43 Cal. 560. See Evansville v. Bayard, 39 Ind. 450, where two taxation acts were held repugnant. An act limiting the damages recoverable for injuries by a railroad which cause death to five thousand dollars is to this extent repealed by a subsequent act fixing the limit of recovery at ten thousand dollars: Pittsburgh etc. Ry. Co. v. Burton, 139 Ind. 357, 37 N. E. 150. An act providing that when the charters of banks were declared forfeited, the debts due to them should be collected by suit instituted by trustees appointed therefor, is repealed by a later act providing that such trustees should sell all the debts due to the banks to the highest bidder for cash: Commercial Bank v. Chambers, 8 Smedes & M. 9. A later act making a different provision on the same subject is not to be construed as an explanatory act, but an implied repeal of a former statute, so far as the provisions are incompatible with each other: People v. Van Nort, 64 Barb. 205. A provision in a general revenue law imposing on express companies a specific privilege tax for state purposes, "in lieu of all other taxes except ad valorem tax," repeals an existing statute imposing a privilege tax on behalf of the municipality: Memphis v. American Express Co., 102 Tenn. 336, 52 S. W. 172.

f. **Where New Law Covers Entire Subject.**—We have seen that a repeal is effected by implication when the provisions of two acts are in irreconcilable conflict. But there is another case in which an implied repeal results, although there be no repugnancy in express terms. This is where the later act covers the whole subject of the first, and contains new provisions showing that the legislature intended it as a substitute: See Breitung v. Lindauer, 37 Mich.

217; Dowdell v. State, 58 Ind. 333; United States v. Barr, 4 Saw. 254, Fed. Cas. No. 14,527: Harolds v. State, 16 Tex. App. 157; Tomlin v. Hildreth, 65 N. J. L. 488, 47 Atl. 649; Lowe v. Board of Commrs., 6 Kan. App. 603, 51 Pac. 579; Camden v. Varney, 63 N. J. L. 325, 43 Atl. 889.

If the later statute was clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the original act: Sacramento v. Bird, 15 Cal. 294; Dexter etc. Co. v. Allen, 16 Barb. 15; Swann v. Buck, 40 Miss. 268; Industrial School Dist. v. Whitehead, 13 N. J. Eq. 290; Harolds v. State, 16 Tex. App. 157; State v. Conkling, 19 Cal. 501.

But it should fully embrace the whole subject matter: Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306; Harolds v. State, 16 Tex. App. 157. It was said by the supreme court of the United States in Norris v. Crocker, 13 How. 429: "As a general rule, it is not open to controversy that where a new statute covers the whole subject matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication, as the provisions of both cannot stand together." In Aikman v. Edwards, 55 Kan. 751, 42 Pac. 366, the rule was clearly stated: "Where the legislature has under consideration not merely minor particulars, but the whole subject matter of the law, it may wholly annul all former legislation on the subject, and pass an act covering the entire field without specifically naming, or attempting to amend, particular provisions in prior statutes. The new act then becomes a substitute for all former legislation on the subject, and may repeal, either in express terms, or by necessary implication, all former sections of the law inconsistent with the new enactment."

If a new statute does in fact cover the entire subject matter of an earlier act, and embrace new and different provisions plainly indicating that it was intended as a substitute therefor, it will operate as a repeal of the former act by implication: Rogers v. Nashville etc. Ry. Co., 91 Fed. 299; Hanley v. Sixteen Horses, 97 Cal. 182, 32 Pac. 10; Longlois v. Longlois, 48 Ind. 60; Gorham v. Luckett, 6 B. Mon. 146; State v. Studt, 31 Kan. 245, 1 Pac. 635; Mersereau v. Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; People v. Carr, 36 Hun, 488; Bartch v. Meloy, 8 Utah, 424, 32 Pac. 694; McMaster v. Thresher Co., 10 Wash. 147, 38 Pac. 760; State v. Mines, 38 W. Va. 125, 18 S. E. 470. And it is not necessary, in order to work a repeal, that the later act should be expressly repugnant to the former. It is sufficient if it covers the entire subject and was intended as a substitute: Henrietta Min. etc. Co. v. Gardner, 173 U. S. 123, 19 Sup. Ct. Rep. 327; District of Columbia v. Hutton, 143 U. S. 18, 12 Sup. Ct. Rep. 369; Sacramento v. Bird, 15 Cal. 294; Swann v. Buck, 40 Miss. 268; Mersereau v. Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; Dexter etc. Co. v. Allen, 16 Barb. 15. The subsequent statute need not be repugnant to a prior one, if it is clearly intended to prescribe

the only rule in the case provided for: Daviess v. Fairbairn, 3 How. 636; Nicol v. St. Paul, 80 Minn. 415, 83 N. W. 375; Anderson v. Camden, 58 N. J. L. 515, 33 Atl. 846. The rule was stated in United States v. Tynen, 11 Wall. 88, to be, that "even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

g. **Effect of Omission of Provisions.**—It frequently occurs that in a later act upon the same subject, some of the provisions of a previous act are omitted or their subject matter is not covered by the later act. The question then arises whether these omitted provisions are repealed or whether they may still be enforced. If the later act is intended to cover the entire subject, and to substitute new rules in the place of the old, then the omitted parts are deemed to be repealed by implication, for, in such a case, it is unnecessary that there should be an irreconcilable repugnance between the provisions of the two acts: See State v. Benevolent etc. Order, 69 Miss. 895, 13 South. 255; Hawes, Petitioner, 22 R. I. 312, 47 Atl. 705; Harolds v. State, 16 Tex. App. 157. It will be presumed in such a case that the provisions of the earlier act not included in the later were intentionally omitted: In re Wheelock, 3 N. Y. Supp. 890, 51 Hun, 640. Where, from the framework of the later act it is apparent that the legislature designed a complete scheme for the particular matter, this amounts to a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored: State v. Conkling, 19 Cal. 501. In Roche v. Jersey City, 40 N. J. L. 257, it was said that "this rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory." To the same effect is Bracken v. Smith, 39 N. J. Eq. 169.

Where, however, the later act is not intended as a complete revision of the subject matter, but is merely an amendment of prior acts and amounts to supplemental legislation, the mere omission of some of the provisions of earlier acts or of their substance does not warrant the inference that a repeal was intended, unless the new act is inconsistent and repugnant with such omitted provisions: See Pratt v. Atlantic etc. R. R. Co., 42 Me. 579; Unity v. Pike, 68 N. H. 71, 44 Atl. 78; Burnham v. Onderdonk, 41 N. Y. 425; State v. Tyrrell, 22 Nev. 421, 41 Pac. 145. The simple incorporation into a private statute of a portion of the provisions of a general public

statute cannot be treated as a repeal of its other provisions which are omitted therefrom: Pratt v. Atlantic etc. R. R. Co., 42 Me. 579. Neither will the enumeration in an act that certain prior statutes should not be affected by it warrant the inference that all other statutes on similar subjects not so enumerated were repealed: Burnham v. Onderdonk, 41 N. Y. 425. See, also, subdivision "I" following.

h. **Effect of Negative Words.**—The statement in the principle case that the use of negative words in a statute makes it more indicative of the legislative purpose to have the new act replace all others upon the subject is clearly the rule laid down by the authorities. The employment of negative words is deemed of great importance in ascertaining what was the intent of the legislature, and, as already pointed out, whether a statute repeals, by implication, a prior one or not is a question of legislative intention: See Mitchell v. Duncan, 7 Fla. 13; Rounds v. Waymart Borough, 81 Pa. St. 395; McVey v. McVey, 51 Mo. 406; Conley v. Supervisors, 2 W. Va. 416.

The court, in Covington v. East St. Louis, 78 Ill. 548, in pointing out that the act under consideration did not contain negative words prohibiting its objects from being accomplished in any other mode, said that "the rule is, that a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent." To the same effect are People v. Mount, 87 Ill. App. 194, affirmed in 186 Ill. 560, 58 N. E. 360; Rounds v. Waymart Borough, 81 Pa. St. 395; Pacific R. R. Co. v. Cass County, 53 Mo. 17. Especially is this true of a general affirmative statute with reference to the particular provisions of an earlier one which are special in their application to particular cases: Conley v. Supervisors, 2 W. Va. 416; Chesapeake etc. Ry. Co. v. Hoard, 16 W. Va. 270.

i. **Amendments.**—An amendment of an act operates to repeal the latter so far as it is repugnant to the original act: Breitung v. Lindauer, 37 Mich. 217; Longlois v. Longlois, 48 Ind. 60. If the amendment simply adds something to the original act, no repeal results, while if the amendment covers the entire subject matter and is intended as a substitute for the original act, it will repeal the original act in its entirety: Longlois v. Longlois, 48 Ind. 60.

Where an act is amended it is not usually repealed so as to affect cases arising under it: State v. Taylor, 2 McCord, 483. Where the legislature enacts a law in the terms of a prior one, and at the same time repeals the former, there is no real repeal, but the new act is a reaffirmance and a continuation of the earlier: Robinson v. Goldsboro, 122 N. C. 211, 30 S. E. 324. An act merely amendatory of a prior law repeals it only so far as is inconsistent with the amendment: State v. White, 49 La. Ann. 127, 21 South. 141.

Amending an act so as "to read as follows," or "which shall hereafter read as follows," operates as a repeal of the original act: State v. Andrews, 20 Tex. 230; Rowan v. Ide, 107 Fed. 161, 46 C.

C. A. 214; Heinze v. Butte etc. Min. Co., 107 Fed. 105, 46 C. C. A. 219; Columbia Wire Co. v. Boyce, 104 Fed. 172, 44 C. C. A. 588; State v. Ingersoll, 17 Wis. 631. But an amendment of a section "to read as follows," will not repeal a former amendment of the same section passed at the same session of the legislature, although the former amendment is omitted therefrom, the two amendments not being inconsistent: Lewis v. Brandenburg, 20 Ky. Law Rep. 1011, 47 S. W. 862. Generally, however, an amendment of an act "to read as follows" will operate as a repeal upon any provision omitted from the new statute: State v. Ingersoll, 17 Wis. 631; State v. Andrews, 20 Tex. 230; People v. McNulty, 93 Cal. 427, 29 Pac. 61. The new act is a substitute for the original, and repeals all those parts of the prior act not included in it: Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717; In re Connellan, 25 Misc. Rep. 592, 56 N. Y. Supp. 157. Strictly speaking, an amendment of an act "to read as follows" is not a repeal of the original act, except as to those parts omitted from the amendment, but is a continuation of the original act to the extent that it is included in the amendment. The former statute is merged in the amendment: People v. Supervisors, 67 N. Y. 109, 23 Am. Rep. 94. The part of the original act which remains unchanged is considered as having continued in force as the law from time of its original enactment, and the new portion as having become the law only at the time of the amendment: Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874; Ely v. Holton, 15 N. Y. 595.

j. **When Repeal Takes Effect.**—A repeal by implication, the same as any other repeal, does not take effect until the new statute goes into effect and becomes operative: State v. Edwards, 136 Mo. 360, 38 S. W. 73. So, where an act does not go into operation until a future date, former statutes repealed thereby do not become repealed until such future date: McArthur v. Franklin, 16 Ohio St. 193.

III. General Act Repealing Special Acts.

a. **General Rule.**—It is a general rule that a general public act will not usually repeal a special or private one: Luke v. State, 5 Fla. 185; People v. Mount, 87 Ill. App. 194, affirmed, 186 Ill. 560, 58 N. E. 360; Beridon v. Barbin, 13 La. Ann. 458; People v. O'Grady, 46 App. Div. 213, 61 N. Y. Supp. 577; Gilbert v. Cook, 44 Ill. App. 69; Butz v. Kerr, 123 Ill. 659, 14 N. E. 671; Blain v. Bailey, 25 Ind. 165; Brown v. County Commrs., 21 Pa. St. 37; Ellis v. Batts, 26 Tex. 703; Parker v. Elmira etc. R. R. Co., 165 N. Y. 274, 59 N. E. 81.

The rule that repeals by implication are not favored has peculiar and special force in the case of laws of special and local application, such laws never being deemed repealed by general legislation except upon the most unequivocal manifestation of an intent to that effect: Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900. Hence, a general statute without negative words will not repeal a previous statute which is particular, though the provisions in the two be

different: Brown v. County Commrs., 21 Pa. St. 37; Rounds v. Waymart Borough, 81 Pa. St. 395. And it has even been held that no repeal will result, though the two acts are inconsistent: Gilbert v. County of Cook, 44 Ill. App. 69; Fraim v. Lancaster County, 171 Pa. St. 436, 33 Atl. 339. A general rule prescribed by a later statute is not accepted as manifesting any purpose to disturb a previously enacted special rule: Naturalization of Osthoff v. Flotte, 48 La. Ann. 1094, 20 South. 282. No repeal will result unless it is impossible that both laws should be enforced: Village of Ridgeway v. Gallatin County, 181 Ill. 521, 55 N. E. 146. If the acts can be reconciled by any reasonable hypothesis, this will be done in order to avoid a repeal: Village of Ridgway v. Gallatin County, 181 Ill. 521, 55 N. E. 146; Louisville v. Louisville W. Co., 20 Ky. Law Rep. 1529, 49 S. W. 766. Where there are weighty reasons why the special act should not be repealed, no repeal will be effected: Parker v. Elmira etc. R. R. Co., 165 N. Y. 274, 59 N. E. 81.

But the rule that a general affirmative act without express words of repeal will not repeal a previous special or local act on the same subject inconsistent with it, is not a rule of positive law, but of construction only, adopted to settle legislative intent in the absence of words declaring such intent: Fraim v. Lancaster County, 171 Pa. St. 436, 33 Atl. 339. Hence, where the act clearly manifests on its face such intention to repeal a prior special act, such result will follow: Pearce v. Bank of Mobile, 33 Ala. 693.

The rule as between general and special statutes will appear more clear if some illustrative cases are cited. Thus, in Coxe v. State, 144 N. Y. 396, 39 N. E. 400, it was held that power conferred upon a public body for a special purpose and applicable to a particular case is not taken away by the passage of a subsequent statute, general in its language, scope, and application. Where a general election law is amended for the purpose of creating an exception in favor of a certain town, it will not repeal a prior special act which excepts another town from the operation of the general act: State v. South Kingstown, 18 R. I. 258, 27 Atl. 599. A general revenue statute does not repeal by implication an earlier statute devoted to some special subject of taxation, not mentioned in the general act, and creating an appropriate and affective system for the taxation of the special subject: Zickler v. Union Bank, 104 Tenn. 277, 57 S. W. 341. Where a special act incorporates certain provisions of an existing general statute, a subsequent amendment or repeal of the general act will not affect the special statute: Furbish v. County Commrs., 93 Me. 117, 44 Atl. 364; Schwenke v. Union etc. R. R. Co., 7 Colo. 512, 4 Pac. 905. A general statute to protect salmon does not repeal a special act on the same subject relating to the Columbia river: State v. Sturgess, 10 Or. 58. A general law relating to the retailing of liquors does not repeal a special act on the same subject which applies to particular towns: McRae v. Wessell, 6 Ired. 153. Of somewhat similar import is Ranbold v. Common-

wealth, 21 Ky. Law Rep. 1125, 54 S. W. 17. A law enacted for a special, particular, and temporary purpose is not usually repealed by a general law passed subsequently: University of Utah v. Richards, 20 Utah, 457, 77 Am. St. Rep. 928, 59 Pac. 96. A general statute providing for the confirmation of titles to real estate does not repeal an act relating to the confirmation of tax titles: Ex parte Morrison, 69 Ark. 517, 64 S. W. 270. A constitutional provision declaring that the legislature shall not hereafter grant lands to any person does not repeal a special act providing that a railroad shall be entitled to receive a grant of a certain amount of land for every mile of road constructed within a certain time: Houston etc. Ry. Co. v. State (Tex.), 39 S. W. 390.

b. Inconsistent and Repugnant Laws.—The mere fact that a general law is inconsistent with a prior special act will not of itself work a repeal of the special act: Gilbert v. Cook County, 44 Ill. App. 69; President v. Rushville, 32 Ill. App. 320; Fraim v. Lancaster County, 171 Pa. St. 436, 33 Atl. 339. The two must be so inconsistent and repugnant to each other that they cannot stand together: President v. Rushville, 32 Ill. App. 320. It must appear that the legislature intended the later general act to take the place of the prior special statute: Gazollo v. McCann, 63 Mo. App. 414. The provisions of the two acts must be repugnant: Sheridan v. Stevenson, 44 N. J. L. 371. Or as was said in Chesapeake etc. Ry. Co. v. Hoard, 16 W. Va. 270, the repugnancy must be so glaring and irreconcilable as to indicate the legislative intent to repeal. Unless the two acts are irreconcilably inconsistent, there will be no repeal by implication: Bateman v. Colgan, 111 Cal. 580, 44 Pac. 238; Manget v. Plummer, 21 Ky. Law Rep. 641, 52 S. W. 844. If the conflict is irreconcilable, and the later general act must necessarily take the place of the prior special act, a repeal will be effected: Holtzel v. East Orange, 50 N. J. L. 354, 12 Atl. 911.

In Pennsylvania, it is held that the rule that a previous local statute is not repealed by a subsequent general statute inconsistent with it unless words of repeal are employed does not apply to classification acts, such as acts classifying municipalities—1. Because the legislative intent to repeal the local acts is clear; 2. Because such acts are of a character to exclude the operation of the rule, being intended to revise the laws relating to all municipal affairs; and 3. Because the very nature of class legislation renders the rule inapplicable. Hence, it is held that whenever any law regulating the municipal affairs of cities of a given class conflicts with a previous local statute applicable to any member of the class relating to the same subject, the latter must give way, and is by implication repealed by the later act: Commonwealth v. Macferron, 152 Pa. St. 244, 25 Atl. 556; Quinn v. Cumberland County, 162 Pa. St. 55, 29 Atl. 289. So it was held that a special act limiting the debt of Pittsburg was repealed by a later general act making other provisions: Bruce v. Pittsburg, 166 Pa. St. 152, 30 Atl. 831. A general

incorporation act authorizing the construction and operation of street railways in a city impliedly repeals a special act granting to one company the exclusive privilege of maintaining a street railway in such city: Wilmington City Ry. Co. v. People's Ry. Co. (Del.), 47 Atl. 245. The rule that a general law does not repeal a special law unless the intent to repeal is clearly manifest does not apply where a local statute, passed by a board of supervisors pursuant to a general legislative enactment, comes into conflict with a subsequent general law covering the same subject: Matter of Reddish, 45 App. Div. 37, 60 N. Y. Supp. 1111. An express repeal of inconsistent general laws will not warrant an inference that inconsistent special laws are not to be repealed, if such an inference would render the repealing act unconstitutional: Road Commission v. Harrington Township, 54 N. J. L. 274, 23 Atl. 666. As to work already done under a special act and liability incurred thereunder, a later general act will not work a repeal: Harrisburg v. Sheck, 104 Pa. St. 53.

When a general act does repeal a special act, it repeals it to the extent of the inconsistency: New Brunswick v. Williamson, 44 N. J. L. 165; Vreeland v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; State v. Tolly, 37 S. C. 551, 16 S. E. 195.

c. General Law Covering Entire Subject.—A general statute covering the entire subject matter, and manifestly designed by the legislature to embrace the entire law upon the subject, will repeal by implication a former special statute, even though the two are not repugnant: Barker v. Town of Floyd, 61 App. Div. 92, 69 N. Y. Supp. 1109. The later general law will repeal special laws inconsistent with the system established by it: Cairo v. Bross, 9 Ill. App. 406. Especially will there be a repeal if the general law is radically inconsistent with the prior special act: Bogardus v. Gordon, 53 N. J. Eq. 40, 30 Atl. 812. Or, if it is evident that the intention of the legislature was to repeal the special act: State v. Purdy, 14 Wash. 343, 44 Pac. 857. But general legislation broad enough to include the subject matter of a prior special act will not abrogate it unless the intent to do so is clear: University Regents v. Auditor General, 109 Mich. 134, 66 N. W. 956. A general law fixing the compensation of jurors in all counties repeals a prior special act fixing such compensation for one county: State v. Sullivan, 62 Minn. 283 64 N. W. 813. So, a general act fixing the term of office of recorders in all counties repeals a prior inconsistent act fixing the term of office of the recorder in a particular county: State v. Pearcy, 44 Mo. 159. See, also, People v. Miner, 47 Ill. 33.

d. Effect on Municipal Charters.—As a general rule, statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities: Wood v. Election Commrs., 58 Cal. 561. And a general act repealing all acts which are repugnant to its provisions will usually be construed as referring to general statutes alone, and not as repealing

village and city charters previously enacted: Walworth County v. Whitewater, 17 Wis. *193, 200; City of Janesville v. Markoe, 18 Wis. 350. Hence, a general act will not be held to repeal provisions of charters granted to municipalities, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the legislature cannot be otherwise satisfied: State v. Donovan, 89 Me. 448, 36 Atl. 982. Privileges granted by a special charter are not affected by subsequent general legislation on the same subject: Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190. This rule is obviously true where the general act and the charter provision are not inconsistent: Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; Eisenhuth v. Ackerson, 105 Cal. 87, 38 Pac. 530. A general law relating to liquor selling was held not to repeal a charter provision of the city of Minneapolis, authorizing the city council to license and regulate the sale of intoxicating liquors within its limits: State v. Lindquist, 77 Minn. 540, 80 N. W. 701. But, where the intention of the legislature clearly appears to repeal a charter provision by a general law, the courts will give it such effect. Hence, in Garrett v. Mayor, 47 La. Ann. 618, 17 South. 238, a general liquor license law, authorizing the granting or withholding of liquor licenses in parishes and cities within parishes by a majority vote of the inhabitants, was held to repeal a charter provision giving the city exclusive authority to regulate liquor selling. A general election law will not supersede special charter provisions, there being no mention in the former of the latter: Welch v. Gossens, 51 La. Ann. 852, 25 South. 472. A general act providing that "every town in the state" could by vote authorize a debt of a certain amount for roads and bridges does not repeal a charter provision of one town giving it unlimited power to vote moneys for such purposes: People v. Board of Supervisors etc., 40 Hun, 353. But we have already seen that where general classification acts are passed, the intention being to include within their purview all cities of a certain class, such legislation repeals special charter provisions of certain cities: See subdivisions III, b, ante. Hence, a general law applying to all cities repeals a permission granted in the charter of one: Acquackanonk Water Co. v. Passaic, 65 N. J. L. 476, 47 Atl. 464. And a city which as a member of one class is provided with a particular system for the levy and collection of taxes, becomes provided with a different system imposed by a general law, when by the mere growth of its population it becomes a city of a higher class: Commonwealth v. Macferron, 152 Pa. St. 244, 25 Atl. 556.

IV. Special Act Repealing General.

In like manner, as a general law will repeal a special law repugnant thereto, so will a special law repeal a general law, to the extent of the locality to which the special law is intended to apply: State v. Routh, 61 Minn. 205, 63 N. W. 621; State v. Archibald, 43 Minn. 328, 45 N. W. 606. Such a rule should be applied with cau-

tion, and the subsequent special act should be plainly irreconcilable with the provisions of the prior general law: State v. Routh, 61 Minn. 205, 63 N. W. 621. There should be a positive repugnancy between the two laws: State v. Kelly, 34 N. J. L. 75. And the rule that a general statute gives way to a later special act to the extent of the repugnance applies only when the special act is complete within itself: Daniels v. State, 150 Ind. 348, 50 N. E. 74. A special act incorporating an insurance company, and providing a particular manner in which shares of stock should be attached and sold on execution, was held to supersede the provisions of a prior general act on the same subject: Titcomb v. Union etc. Ins. Co., 8 Mass. 326. If the two acts are not repugnant and effect may be given to both, no repeal by implication will result: Board of Commrs. v. Society for Savings, 90 Fed. 233, 32 C. C. A. 596; Board of Commrs. v. Society for Savings, 101 Fed. 767, 41 C. C. A. 667.

V. Revision or Codification.

a. **New Statute Intended as a Substitute.**—The rule is the same here as elsewhere when a new act is passed covering the entire subject matter, and manifestly intended as a substitute for previous laws, the earlier laws will be repealed, and the one system intended to be enacted by the revised statute will prevail: Pulaski County v. Downer, 10 Ark. 588; State v. Conkling, 19 Cal. 501; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Jernigan v. Holden, 34 Fla. 530, 16 South. 413; Kent v. United States, 73 Fed. 680, 19 C. C. A. 642; Illinois etc. Canal v. Chicago, 14 Ill. 334; Andrews v. People, 75 Ill. 605; State Board of Health v. Ross, 91 Ill. App. 281, affirmed, 191 Ill. 87, 60 N. E. 811; Ashley, Appellant, 4 Pick. 21; State v. Rogers, 10 Nev. 319; Towle v. Marrett, 3 Me. 22; Little v. Cogswell, 20 Or. 345, 25 Pac. 727; Reinhardt v. Fritzsche, 69 Hun, 565, 23 N. Y. Supp. 958; Dickinson v. State, 38 Tex. Cr. Rep. 472, 41 S. W. 759, 43 S. W. 520; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; People v. Peck, 22 Misc. Rep. 477, 50 N. Y. Supp. 820. A revision implies a re-examination of the previous acts, and the later act is a restatement of the law in an improved or corrected form: Jernigan v. Holden, 34 Fla. 530, 16 South. 413. In Mack v. Jastro, 126 Cal. 130, 58 Pac. 372, it was said that in cases of revision where a new and complete scheme is substituted, the later statute operates, not so much as a repeal by implication, as that the new and later scheme must prevail as a substitute for the old, even in respect to parts where there are found no inconsistencies or repugnancies between the two. And the rule unquestionably is that to work a repeal it is not required that the later statute shall be so repugnant to the earlier that both cannot stand and be construed together. The revision in itself operates as a repeal: Jernigan v. Holden, 34 Fla. 530, 16 South. 413; Mansfield v. First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999. Where two inconsistent statutes are carried into the codified law, the one last passed, which is the later

declaration of the legislative will, will prevail: Northern Pac. R. R. Co. v. Ellison, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263. Where a code is adopted as one act, of two inconsistent sections, the one latest in position will prevail, as from its position it is presumed to be the last expression of the legislative will: Lamar v. Allen, 108 Ga. 158, 33 S. E. 958.

A revision of the banking law supersedes all prior provisions affecting savings banks: People v. Peck, 157 N. Y. 51, 51 N. E. 412. A revision of all laws relating to the Illinois and Michigan canal repeals all former laws and is a substitute for them: Canal Commrs. v. East Peoria, 179 Ill. 214, 53 N. E. 633. A revision of the entire criminal code repeals all former laws in relation to the subject: Schwartz v. Ritter, 186 Ill. 209, 57 N. E. 887. So an act intended to be a complete system of statutory law relating to crimes and punishments repeals all prior statutes on that subject: Buchannon v. Commonwealth, 15 Ky. Law Rep. 738, 25 S. W. 265. An act regulating the practice of medicine and surgery, which revises the whole subject matter, repeals prior laws: Ex parte Ferdon, 35 Or. 171, 57 Pac. 376.

Where a statute is intended to cover all the ground of prior ones on the same subject, and revises the entire law on such subject, all prior conflicting laws will be repealed whether they are general or special acts: Andrews v. People, 75 Ill. 605. But where the scheme of revision clearly implies a compilation and continuation of existing general laws, together with such changes as are necessary to harmonize them, the revised laws will not operate as a repeal of a special statute which has already engrafted an exception upon the general law: State v. Commissioners, 106 Wis. 584, 82 N. W. 549. The mere re-enactment in substance of a section of a former statute will not necessarily repeal it: Alexander v. State, 9 Ind. 337; Martindale v. Martindale, 10 Ind. 566. In Lyon v. Fisk, 1 La. Ann. 444, the court held that where the laws were reduced into the form of a code, without any clause of repeal, the rule was the same as in other cases of successive statutes—namely, that there would be no repeal by implication, except in case of manifest repugnance. The question is one of legislative intention, and where the intent appears from the new act it will be given effect. Hence, where the revisory act prescribes what its operation shall be upon a previous act, no other effect can be given, and the general rule that a statute is impliedly repealed by a subsequent act revising the whole matter does not apply: Patterson v. Tatum, 3 Saw. 164, Fed. Cas. No. 10,830. And, where an act which revises the subject matter of a former one expressly provides that all acts and parts of acts inconsistent with its provisions shall be repealed, the provisions of a former act relative to the same subject, and not inconsistent with the later act, will remain in force: Lewis v. Stout, 22 Wis. 234.

b. **Effect of Omitting Prior Acts.**—A mere compilation of laws which is not a code or a revision does not have the effect of repeal-

ing existing statutes not included therein: Taylor v. Chickasaw County, 74 Miss. 23, 19 South. 834. The mere failure to incorporate a previous act into the Revised Statutes does not repeal it by implication: Cape Girardeau County Court v. Hill, 118 U. S. 68, 6 Sup. Ct. Rep. 951; Beatty v. Miller, 146 Ind. 231, 44 N. E. 8. Where, in a system of codes which have been prepared, there is an entire absence of legislation upon a particular subject, a prior act on such subject is not repealed: Carpenter v. Jones, 121 Cal. 362, 53 Pac. 842. In this case the codes only repealed existing statutes "in all cases provided for by this code." In South v. State, 86 Ala. 617, 6 South. 52, an instruction to code commissioners to incorporate all acts amendatory of the old code was held to be directory merely, and will not repeal acts omitted from the code by them. Where a general act revising the criminal laws did not legislate upon "pools, trusts, and conspiracies," a prior law thereon omitted from the revision was held not to be repealed: Commonwealth v. Grinstead, 21 Ky. Law Rep. 1444, 55 S. W. 720. The court said that it was the intention of the legislature that the new revision should be a complete system only as to the subjects with which it dealt and the offenses of which it treated. Certainly, as to statutes upon all subjects which are treated, a revision operates as a repeal of prior laws omitted therefrom: State v. Judge, 37 La. Ann. 578; Flores v. State, 41 Tex. Cr. Rep. 166, 53 S. W. 346. So, where all the laws and parts of laws upon a certain subject were revised and repealed but one, which was inadvertently overlooked, the one so omitted will be deemed repealed by implication: Mayor of New York v. Broadway etc. R. R. Co., 12 Hun, 571.

Where an old statute is revised, and the new act is intended to substitute a new scheme on the subject, it would seem to be clear that any part of the old statute not included in the new must be ignored, and be deemed to have been repealed: Pulaski County v. Downer, 10 Ark. 588; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; State v. Conkling, 19 Cal. 501; Broaddus v. Broaddus, 10 Bush, 299; In re Connellan, 25 Misc. Rep. 592, 56 N. Y. Supp. 157; State Board of Health v. Ross, 91 Ill. App. 281, affirmed, 191 Ill. 87, 60 N. E. 811; Pingree v. Snell, 42 Me. 53; Ellis v. Paige, 1 Pick. 43; Blackburn v. Walpole, 9 Pick. 97; Cannon v. Beatty, 19 R. I. 524, 34 Atl. 1111. In Moore v. Miller, 1 Litt. 356, an act "to reduce into one the several acts subjecting lands to the payment of debts," was held not to repeal an omitted section of a prior act, where the later act had no repealing clause.

VI. Acts Passed at the Same Session of the Legislature.

If two acts are passed at the same session of the legislature effect should be given to both if possible, and the presumption is said to be strong against an implied repeal: State v. Rotwitt, 17 Mont. 41, 41 Pac. 1004; Smith v. People, 47 N. Y. 330. The fact that two statutes, similar in their nature and purpose, were both

passed at the same session of the legislature, and took effect upon the same day, is strong evidence that they were intended to stand together: Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127. Hence, the general rule is that one act will not usually repeal a prior act passed at the same session of the legislature: Administrators of Weatherford v. Weatherford, 8 Port. 171; New Orleans v. Mechanics' etc. Bank, 15 La. Ann. 107; Curtwright v. Crow, 44 Mo. App. 563. But where there is an irreconcilable conflict between such statutes or between sections of a revision, the one last enacted will govern and repeal the earlier repugnant one: Congdon v. Butte etc. Ry. Co., 17 Mont. 481, 43 Pac. 629; Cain v. State, 20 Tex. 355. The later will repeal the earlier in so far as it is repugnant: Bailey v. Drane, 96 Tenn. 16, 33 S. W. 573; People v. Lytle, 1 Idaho, 143. Where two acts passed at the same session are so inconsistent that they cannot be harmonized, and one of them contains an emergency clause and the other does not, the one with the emergency clause must be taken to overcome the other: Heilig v. City Council, 7 Wash. 29, 34 Pac. 164.

Such acts as we are now considering should be harmonized, if possible: Curtwright v. Crow, 44 Mo. App. 563. And, if they are not inconsistent with each other both will stand: Smith v. School Commrs., 81 Md. 513, 32 Atl. 193. Hence, if the acts are in aid of each other, no repeal will be effected: State v. Schoonover, 135 Ind. 526, 35 N. E. 119. Acts passed at the same legislative session are construed as one act on the same subject. And, instead of holding such acts repugnant, the courts will give effect to both, although in order to do so, it becomes necessary to engraft one upon the other, or incorporate the earlier into the later act, as an exception to its provisions: Cain v. State, 20 Tex. 355; Peyton v. Moseley, 3 T. B. Mon. 80.

A general law passed at the same session as a special law will not repeal the later as a general rule: McFarland v. State Bank, 4 Ark. 410; Ottawa v. La Salle County, 12 Ill. 339. Where a special and general act are substantially contemporaneous, the special must be taken as intended to constitute an exception to the general act, since the legislature will not be presumed to have intended a conflict: Nelden v. Clark, 20 Utah, 382, 77 Am. St. Rep. 917, 59 Pac. 524.

VII. Penal Statutes.

a. General Rule.—It is already apparent from the criminal cases heretofore cited that the general rules relating to the repeal of statutes by implication are as applicable to penal statutes as they are to any other class: See, further, State v. White, 49 La. Ann. 127, 21 South. 141; Schwartz v. Ritter, 186 Ill. 209, 57 N. E. 887; Buchannon v. Commonwealth, 15 Ky. Law Rep. 738, 25 S. W. 265.

The criminality of an offense may be repealed by implication: Somers v. Commonwealth, 97 Va. 759, 33 S. E. 381. And where a

later criminal statute embraces the whole subject of a former act, and is plainly intended to be a substitute for the latter, the prior act will of necessity be repealed by implication: Inman v. State, 65 Ark. 508, 47 S. W. 588; Blackwell v. State, 45 Ark. 90; Somers v. Commonwealth, 97 Va. 759, 33 S. E. 381. So, where prior acts are revised, consolidated, and re-enacted in a code, the code repeals by implication the prior acts upon the subject revised: State v. Jenkins, 73 Miss. 523, 19 South. 206. The question is, however, one of legislative intent. And where no intent to repeal prior acts reasonably appears, no repeal will result: State v. Caldwell, 9 Wash. 336, 37 Pac. 669.

b. **Same Subject and Object.**—As in other statutes, a penal act, in order to repeal a prior act, must relate to the same subject and have the same object in view. So, where a later statute defines an offense described in an earlier statute, the latter is repealed: Johns v. State, 78 Ind. 332, 41 Am. Rep. 577. But an act authorizing an accused to make a voluntary statement before an examining court, which may be used in evidence against him, is not repealed by implication by a subsequent act authorizing defendants to testify in their own behalf, since the two acts relate to entirely different subjects: Aiken v. State (Tex. Cr.), 64 S. W. 57. Where the objects of two acts and the evils which they are designed to remedy are different, the later act will not work a repeal of the former by implication: State v. Rieger, 59 Minn. 151, 60 N. W. 1087. Hence, a salary act requiring county officers, under a penalty, to pay into the county treasury all fees collected in excess of their fixed salaries, does not repeal a prior act providing a penalty for all officers intrusted with the collection of money for a county who shall fail to pay over all moneys collected: Adams v. People, 25 Colo. 532, 55 Pac. 806. So an act requiring a bond to be given in relation to the business of selling liquors in any quantity "to be drunk on the premises" does not repeal a prior act requiring a bond to be given in relation to the business of selling intoxicating liquors "in quantities less than a quart": State v. Drake, 86 Tex. 329, 24 S. W. 790.

c. **Inconsistent and Repugnant Acts.**—If a later criminal act is inconsistent with and repugnant to a prior act, the latter will be repealed by implication. The rule as to penal statutes is the same as to other acts: Wall v. State, 23 Ind. 150; State v. Craig, 23 Ind. 185; Somers v. Commonwealth, 97 Va. 759, 33 S. E. 381. Hence, a statute defining felonies and making a certain act a felony will be repealed by a later statute which declares the same act to be a misdemeanor: Hayes v. State, 55 Ind. 99. And a law subjecting a free colored person to corporal punishment for raising his hand in opposition to a white person is repealed by a law "to suppress riots, routs, and unlawful assemblies of the people and breaches of the peace": Ely v. Thompson, 3 A. K. Marsh. 70. An act levying a tax upon and licensing ten-pin alleys repeals by implication a prior act prohibiting betting on such games, since the

legislature evidently intended by the subsequent act to authorize the playing of the game in the customary manner—that is, to permit the players, as between themselves, to wager the alley fees on the game: Rutherford v. State, 39 Tex. Cr. Rep. 137, 45 S. W. 579. And see Houghton v. State, 41 Tex. 136. But the general rule undoubtedly is that the imposition of a privilege tax upon a business that is forbidden and punished by the criminal laws does not operate to render such business legal, or to entitle one who has paid the tax and obtained license therefor to pursue such business in violation of the criminal laws: Blanfield v. State, 103 Tenn. 593, 53 S. W. 1090, and cases cited.

Where there is no conflict between the two acts, and effect can be given to both, this will be done: Lacey v. Palmer, 93 Va. 159, 24 S. E. 930; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469. Hence, an act providing that the conversion of unmarked or unbranded cattle, hogs, or sheep running at large shall not be larceny is not impliedly repealed by subsequent act providing that any person who shall steal any kind of cattle, pigs, hogs, sheep, or goats shall be guilty of larceny: Thompson v. State, 60 Ark. 59, 28 S. W. 794. And an act making conscientious scruples of a juror against capital punishment ground of challenge for cause in prosecutions for murder is not impliedly repealed by a later act conferring upon the jury discretion to fix the punishment, upon conviction for murder in the first degree, at imprisonment for life instead of the death penalty. The two acts are not in conflict: Hill v. State, 42 Neb. 503, 60 N. W. 916.

d. **Extent of Repeal.**—A prior inconsistent act is repealed only to the extent of such inconsistency: Korth v. State, 46 Neb. 631, 65 N. W. 792. Hence, an act on burglary, the scope of which is enlarged by a later act, is not repealed in so far as it provides upon whom the burden of proof rests: State v. Wilson, 9 Wash. 218, 37 Pac. 424. But, as has already been seen in another connection, if the subsequent act is an entire revision of the subject matter of a prior act and intended as a substitute therefor, it will repeal the prior act, though some of its provisions may not be repugnant to the later act: State v. White, 49 La. Ann. 127, 21 South. 141; Schwartz v. Ritter, 186 Ill. 209, 57 N. E. 887; Buchannon v. Commonwealth, 15 Ky. Law Rep. 738, 25 S. W. 265.

An act relating to crimes which by its terms repeals all prior acts does not by necessary implication repeal a prior act which provides that all crimes committed shall be prosecuted and punished under the laws in force at the time, notwithstanding the repeal of such laws before the trial takes place: Jackson v. State, 12 Ga. 1.

e. **Penalty Changed.**—A subsequent act which increases the penalty for a particular offense repeals a prior act in so far as the penalty is concerned: Flaherty v. Thomas, 12 Allen, 428; Buckallen

v. Ackerman, 8 N. J. L. 48; Leighton v. Walker, 9 N. H. 59; Carter v. Hawley, Wright, 74. And a later act which imposes a milder punishment will usually repeal a prior inconsistent act: State v. Whitworth, 8 Port. 434; Smith v. State, 1 Stew. 506. A distinction has been drawn between the effect of statutes which increase the punishment and those which merely vest in the court a discretion, by the exercise of which they are authorized to mitigate the sentence to which an offender is liable, by dispensing with a portion of the prescribed punishment. If the last result is intended, and the act "only mitigates or alleviates the punishment, an offense committed while the old law was in force may be punished according to the new and milder rule," said the court in Flaherty v. Thomas, 12 Allen, 428. "But where the new law authorizes a punishment greater in degree, or so different in kind that it cannot be held to be a mere mitigation of the punishment, ... the former law is wholly repealed." To the same effect is Dolan v. Thomas, 12 Allen, 421. The general effect of a complete change in the punishment or penalty imposed, whether it is less or greater than that imposed by the earlier act, is to work a repeal by implication of the original act: Leighton v. Walker, 9 N. H. 59; Nichols v. Squire, 5 Pick. 168.

An act providing for an offense made by a previous law, and providing a different punishment, will generally be held to repeal the former act, and not as cumulative: State v. Smith, 44 Tex. 443; Gorman v. Hammond, 28 Ga. 85; Nichols v. Squire, 5 Pick. 168; Commonwealth v. Kimball, 21 Pick. 373; State v. Monger, 111 N. C. 675, 16 S. E. 229; Norris v. Crocker, 13 How. 429; Dowdell v. State, 58 Ind. 333.

The two acts must, however, be repugnant, and cover the same offense. Hence, where the last act does not cover the entire subject matter, and there is no irreconcilable repugnancy between the two acts, they can stand together and both be given effect: Coghill v. State, 37 Ind. 111. And an act regulating punishment for petit larceny will not repeal a prior general act on larceny: State v. Henderson, 47 La. Ann. 642, 17 South. 200.

A subsequent act which merely adds accumulative penalties and institutes new methods of proceeding does not repeal a former statute at least without negative words: Mitchell v. Duncan, 7 Fla. 13; Bush v. Texas, 1 Tex. 455. A special act imposing additional restrictions on fishing does not repeal the prohibitions of a general act, but merely supplements and strengthens them: Oliver v. Bailey, 85 Me. 161, 27 Atl. 90. An act which fixes the tax upon the privilege of standing jacks, and prescribes certain measures for the enforcement of its collection, does not repeal a prior act which imposes a penalty for the exercise of such a privilege without a license, since the later act is merely cumulative of the earlier: Cate v. State, 3 Sneed, 120. But where a later act revises the whole subject matter of a prior act, and fails to impose a penalty for the offense, the earlier act is repealed including the penalty which was

imposed thereby: Commonwealth v. Kelliher, 12 Allen, 480; Smith v. State, 1 Stew. 506.

f. General and Special Acts.—The rule as to a general act repealing a special act is the same as applied to criminal legislation as to legislation of any other character. As a general rule, a general law will not repeal a special one. It is a question of legislative intention, however, and this intention will control. Where there is no intention to repeal a prior special act, no such repeal will be effected. Hence, a general law providing for the punishment of grand larceny and other offenses will not repeal a special act relating to the punishment of horse stealing: Magruder v. State, 40 Ala. 347. Of similar import is Wilburn v. Territory (N. Mex.), 62 Pac. 968, where a special act enacted for the protection of livestock was concerned. As a rule, a general act relating to a class of offenses will not repeal a special act relating to a special offense which might be included within the class provided for: State v. District Court, 14 Mont. 452, 37 Pac. 9. And see People v. Kinney, 110 Mich. 97, 67 N. W. 1089. Thus, an act to supplement an act to reform the penal laws of the state does not repeal a special act making the forgery of a check on a bank a felony: Drew v. Commonwealth, 1 Whart. 279. But a general act providing for the punishment of a particular offense throughout the state will repeal a special act on the same offense, limited to a single county: Nusser v. Commonwealth, 25 Pa. St. 126.

VIII. Effect of Provisions in Constitution.

a. In General.—A provision in a state constitution will, the same as an ordinary statutory provision, repeal by implication prior legislative or constitutional provisions inconsistent therewith: State v. Holcomb, 46 Neb. 612, 65 N. W. 873; State v. Holcomb, 46 Neb. 88, 64 N. W. 437; People v. Cleary, 13 Misc. Rep. 546, 35 N. Y. Supp. 588; Cass v. Dillon, 2 Ohio St. 607; Remington v. Higgins, 6 S. Dak. 313, 60 N. W. 73; Robinson v. Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722; Louisville etc. Ry. Co. v. Barboursville, 20 Ky. Law Rep. 1105, 48 S. W. 985. And this repugnancy must be necessary and obvious, for if the statute and the constitutional provision can be harmonized, this must be done, and the statute allowed to stand: Cass v. Dillon, 2 Ohio St. 607. The constitution only repeals to the extent of the inconsistency, and the prior act may be so amended as to be brought into harmony with the constitution: Jacksonville etc. Ry. Co. v. Adams, 33 Fla. 608, 15 South. 257.

Many of the state constitutions contain a provision prohibiting amendments to a statute by mere reference to its title, and requiring that all prior amended statutes should be re-enacted and published at length as modified. Under such a provision it has been contended that there could be no modification of an earlier act and no repeal of it in part without such re-enactment, and hence that repeals by implication were abrogated by such constitutional provisions. Without exception, we believe, the courts have not sus-

tained this view, but, to the contrary, have held that such a constitutional provision had no effect upon repeals by implication, and that in adopting a constitutional section of this nature there was no intention of abrogating the long-established rule of law relating to repeals by implication: Spencer v. State, 5 Ind. 41; Branham v. Lange, 16 Ind. 497; State v. Gerhardt, 145 Ind. 489, 44 N. E. 469; People v. Mahaney, 13 Mich. 481; Swift v. Van Dyke, 98 Ga. 725, 26 S. E. 59; Lehman v. McBride, 15 Ohio St. 573; Home Ins. Co. v. Taxing District, 4 Lea, 644; Ballentine v. Mayor, 15 Lea, 633; Houston etc. Ry. Co. v. State (Tex.), 39 S. W. 390. This question was elaborately considered by Justice Cooley in People v. Mahaney, 13 Mich. 481.

Where the constitution imposes a duty upon the legislature of formally repealing all acts that are amended, the failure to do so will not prevent their repeal, but they are repealed by virtue of the constitution: Medical College v. Muldon & Sons, 46 Ala. 603.

b. **Effect of Unconstitutional Statutes.**—A repeal by implication will not usually be effected where the later act, relied upon to work the repeal, is unconstitutional: Randolph v. Builders' etc. Co., 106 Ala. 501, 17 South. 721; County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594; Santa Cruz Rock etc. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 518; Ex parte Davis, 21 Fed. 396; City of Westport v. McGee, 128 Mo. 152, 30 S. W. 523; State v. Hallock, 14 Nev. 202; Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521.

To be sure, an act unconstitutional in itself may contain a valid clause repealing another act, but the intention of the legislature to wipe out the previous enactment must be clearly and unequivocally expressed: County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594. It is competent for the legislature to repeal any act though every other clause in the repealing statute may be unconstitutional: Ely v. Thompson, 3 A. K. Marsh. 70. But it is not a sufficient indication of an intent to repeal a prior act to merely say in an unconstitutional statute that all acts inconsistent therewith are hereby repealed: County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594. And no mere repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force: County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594; Santa Cruz Rock etc. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329. Where it is not clear that the legislature intended to repeal a prior law, without regard to the new provisions to be substituted for it, a repealing clause in an unconstitutional statute will be ineffective: Randolph v. Builders' etc. Co., 106 Ala. 501, 17 South. 721; State v. Hallock, 14 Nev. 202, 33 Am. Rep. 559.

IX. Statutes Adopting or Repealing the Common Law.

A statute adopting the common law as the basis of jurisprudence of a state or territory will not repeal prior statute law, for the ob-

vious intention is only to adopt so much of the common law as does not conflict with such prior statutes: Bent v. Thompson, 5 N. Mex. 408, 23 Pac. 234. So, where the legislature undertakes to provide for a specific matter already covered by the common law, the omission in the provisions of the statute of certain portions of the common-law rule will be taken as indicative of the legislative intent to repeal or abrogate the entire common-law rule on the subject. And this is true although the statute, so far as it goes, is in exact conformity with the common law: In re Lord etc. Co., 7 Del. Ch. 248, 44 Atl. 775.

X. Statutes Giving Different Powers, Privileges, or Duties.

Whether a statute giving different powers, privileges, or duties will repeal prior legislation upon the same subject will depend upon the intention of the legislature as determined by the general rules we have already discussed.

If the two acts are not inconsistent with each other, and can be harmonized, this will be done and the two allowed to stand. Hence, a law which merely enlarges the powers of railroad companies acquiring lines by purchase or lease, as to the mode of payment therefor, is not inconsistent with, and does not repeal, the provision of existing general laws requiring the consent of stockholders to such purchase or lease: Rogers v. Nashville etc. Ry. Co., 91 Fed. 299, 33 C. C. A. 517. So, privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the two will stand together—the one as the law of the particular case, the other as the general law of the land: Board of Commrs. v. Aetna Life Ins. Co., 90 Fed. 222, 32 C. C. A. 585. And an act establishing the jurisdiction of the board of state harbor commissioners is not repealed by a subsequent act passed for the purposes of giving the board certain other powers, and restricting their powers as to certain matters: People v. Pacific Imp. Co., 130 Cal. 442, 62 Pac. 739. Similarly, a statute which does not take away any right nor impose a substantially new duty, but which regulates, with additional requirements, a duty imposed by a previous act, is not to be deemed inconsistent with such previous act: Staats v. Hudson River R. R. Co., 4 Abb. App. Dec. 287. A new remedy provided at law for the abatement of nuisances does not repeal a prior remedy in equity, since the two may properly exist together: State v. Martin, 68 Vt. 93, 34 Atl. 40. In Tyson v. Postlewaite, 13 Ill. 727, it was held that where the legislature passed a law, the manifest object of which was to extend a benefit or create a right, under a misapprehension, or in ignorance of the existence or effect of a former law, which extended a greater benefit or created a greater right than that provided by the new law, the first law is not repealed or affected by the last, so as to limit or abridge the right or benefit and restrict it within the limits of the last law,

unless there are restrictive words showing an intention that no greater right or benefit shall be enjoyed than is provided in the last law.

An act fixing a different salary for a particular officer is necessarily inconsistent with a prior act: Pierpont v. Crouch, 10 Cal. 315. So an act increasing the power of county commissioners to create debts and assess taxes is an implied repeal of any prior conflicting statutory limitation: Commonwealth v. Commissioners, 40 Pa. St. 348. And where statutes grant rights which are conditioned on different things, the inconsistency operates as a repeal of the earlier act: Gwinner v. Lehigh etc. R. R. Co., 55 Pa. St. 126.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

HUNDLEY v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[105 Ky. 162, 48 S. W. 429.]

TORT—INJURY TO VOCATION.—For every injury from a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. (p. 300.)

RAILROADS—RECORD OF EMPLOYÉ.—A railroad company has a right to keep a record of the causes for which it discharges an employé, but a false entry thereon must be regarded as intended to injure him, and therefore a malicious act. (p. 300.)

RAILROAD EMPLOYÉ—BLACKLISTING.—In an action by a railroad employé against the company for making a false entry upon its record of the reason for his discharge, and entering into a combination with other railroad companies by which its discharged employés shall not be employed by them, the petition is demurrable if it does not aver that the employé has sought and been refused employment by reason of the alleged wrongful acts. (p. 301.)

H. P. Cooper, for the appellant.

Edward W. Hines, Lisle & McChord, H. W. Bruce, and W. C. McChord, for the appellee.

163 PAYNTER, J. It is averred in the petition as amended that the plaintiff has no trade or calling except railroading; that for the past five years he has been in the employment of the defendant; that while engaged in the discharge of his duties he was wrongfully, unlawfully, and maliciously discharged by it; that it wrongfully, unlawfully, and maliciously blacklisted him; that he was blacklisted wrongfully, unlawfully, maliciously, and falsely by its placing upon

its records a pretended cause of discharge, to wit, neglect of duty, with a view of injuring and preventing him from entering its employment or that of other railroad companies; that it had entered into a conspiracy and combination with other railroad companies by which its employés discharged for cause will not be given employment by other railroad companies; that, on account of its false and malicious acts and its conspiracy with other railroad companies, he has been deprived of the right to again engage in the employment of the defendant or other railroad companies; that the wrongful acts mentioned were committed for the purpose of making, and had made it impossible for him to ever again get employment from the defendant on any of its lines, or from other railroad companies in the United [164] States; and that he has been damaged thereby in the sum of five thousand dollars.

Our attention has not been invited to, nor have we been able to find, any reported case involving exactly the same question as is involved in this case. It is a novel question to this court, although there are reported cases of other courts the doctrine of which might be applied to this case. As the population of the country increases, as the business and commercial industries multiply, as inventive genius causes the civilized peoples of the world to marvel at its discoveries and productions, as space is annihilated by the means of rapid transit for man, commerce, thought, and sound, thus facilitating the conduct of the business, the pursuit of occupations and callings, and the promotion of the social and political intercourse of the world, courts are called upon to apply familiar principles to new questions; if none seem to be applicable, to enunciate a just rule, suited to the state of facts before it and for future application to similar facts. It can never be said that the novelty of a complaint is an objection to the action. The familiar maxim of the law, "Ubi jus, ibi remedium," is considered valuable by all courts. It was this maxim which caused the invention of the form of action called an "action on the case." It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice, or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person sui juris is entitled to pursue any lawful [165]

trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty, and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation, or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. One who has followed a certain trade or calling for years may be almost unfitted for any other business. To deprive him of his trade or calling is to condemn, not only him, but perchance a wife and children, to penury and want. Public interests, humanity, and individual rights, alike, demand the redress of a wrong which is followed by such lamentable consequences. A railroad company has the right to engage in its service whomsoever it pleases, and, as part of its rights to conduct its business, is the right to discharge anyone from its service, unless to do so would be in violation of contractual relations with the employé. It is the duty of a railroad company to keep in its service persons who are capable of discharging their important duties in a careful and skillful manner. The public interest, as well as the vast property interests of the company, require that none other should be employed by it. Its duty in this regard and its right to discharge an employé does not imply the right to be guilty of a violent or malicious act, which results in the injury of the discharged employé's calling. The company has the right to keep a record of the causes for which it discharges an employé, but in the exercise of this right 100 the duty is imposed to make a truthful statement of the cause of the discharge. If, by an arrangement among the railroad companies of the country, a record is to be kept by them of the causes of the discharge of their employés, and when they are discharged for certain causes the others will not employ them, it becomes important that the record kept should contain a true statement of the cause of an employé's discharge. A false entry on the record may utterly destroy and prevent him from making a livelihood at his chosen business. Such false entry must be regarded as intended to injure the discharged employé; therefore a malicious act. If it is the custom of the railroads of the country to keep such record, and

that employés discharged for certain causes are not to be employed by them, then it enters into, and forms part of, every contract of employment that neither a false entry shall be made, nor one so made communicated, directly or indirectly, to any other railroad company. Suppose it was the custom of the railroads, when an employé was discharged without cause, to give him a card or statement to that effect, and if he did not have such card or statement he could not get employment with other railroad companies, then that custom would enter into every contract of employment; and if a company wrongfully refused to give it to the discharged employé, and in consequence of which refusal he was injured, a cause of action would lie for the damages sustained. For such breach of duty the employé could maintain an action ex contractu or ex delicto, at his option. Addison on Torts (volume 1, 17) says: "A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of contract, or an [107] action ex delicto for the breach of duty, may be brought, at the option of the plaintiff." It was one of the purposes of the common law to protect every person against the wrongful acts of every other person, and it did not matter whether they were committed by one person or by a combination of persons, and under it an action was maintainable for injuries done by disturbing a person in the enjoyment of any right or privilege which he had. It is said by Cooley on Torts, 278: "Thus, if one is prevented, by the wrongful act of a third party, from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequences of the wrongful act." It is said by Addison on Torts (volume 1, 14): "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." The plaintiff does not seek to recover because he was discharged in violation of a contract which he had with the defendant. He does not allege that he had a contract with it to perform services for it for a given length of time. He seeks to recover damages for its alleged wrongful act in making the false entry upon its record against him, to prevent him from pursuing his calling by rendering it impossible for him to get employment from other railroad companies.

The petition does not state a cause of action against the defendant. The averments that he had been deprived of the "right" to again engage in the employment of other railroad companies, and that the alleged wrongful act had made it impossible for him to ever again get employment with other railroad companies, are mere conclusions of the pleader from the facts alleged. It should have been averred that he had sought, and been refused, employment [168] by reason of the alleged wrongful act. An agreement made with other railroad companies not to employ defendant's discharged employés does not injure the plaintiff unless carried out. An averment that the defendant conspired and combined with other railroad companies to do an act, if unlawful, would not obviate the necessity of making the averment that he had sought and been refused employment by reason of the alleged wrongful act. Injury is the gist of the action. The liability is damages for doing, not conspiracy. The charge of conspiracy does not change the nature of the act. In an action for damages, there must be some overt act, consequent upon the agreement to do a wrong, to give the plaintiff a standing in a court of law: Jaggard on Torts, 638; Cooley on Torts, 279.

For the reasons given the judgment sustaining a demurrer to the petition is affirmed.

A Railroad Company has a right to print and circulate to its officers and employés a discharge list, and an ex-employé whose name appears thereon as discharged for carelessness cannot maintain libel against the company in the absence of proof that such publication was known to be false and actuated by malice. A company having reason to believe that a discharged employé seeking an important position in the railway service is incompetent is under obligation to communicate its knowledge or belief to those likely to employ him: Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555. See, also, Hebner v. Great Northern Ry. Co., 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; New York etc. R. R. Co. v. Schaffer, 65 Ohio St. 414, 87 Am. St. Rep. 628, 62 N. E. 1036.

HERNDON v. COMMONWEALTH.

[105 Ky. 197, 48 S. W. 989.]

CONSTITUTIONAL LAW—HABITUAL CRIMINAL ACT.—A statute imposing an increased punishment for an offense by reason of former convictions is constitutional. (p. 304.)

HABITUAL CRIMINAL ACT—EFFECT OF PARDON.—The fact that a defendant was pardoned of the crime of which he was first convicted does not relieve him from liability for the increased penalty imposed by statute on a third conviction. (p. 304.)

HABITUAL CRIMINAL ACT—FORM OF VERDICT.—In a prosecution of a defendant, against whom are prior convictions, under a statute imposing heavier penalties for second and third offenses, a verdict is sufficient which, under the instructions of the court, is in effect a finding of the former convictions, though there is no express finding thereof. (p. 305.)

George Denny and Hobbs & Farmer, for the appellant.

W. S. Taylor, attorney general, and M. H. Thatcher, for the appellee.

199 HOBSON, J. The appellant, Ben Herndon, was tried and convicted in the Fayette circuit court on June 21, 1893, of the crime of housebreaking, and sentenced to three years in the penitentiary. On July 2, 1895, he was pardoned by the governor for this crime. Afterward, and at the April term of the same court, 1897, he was tried and convicted of the crime of maliciously shooting John Jackson, and his punishment fixed at one year in the penitentiary. After all this, at the September term, 1898, he was again indicted in the Fayette circuit court of the crime of maliciously shooting and wounding Dabney Carr, this indictment setting up his two previous convictions of felony. He was found guilty, and his punishment, pursuant to section 1130 of the Kentucky Statutes, was fixed at confinement in the penitentiary for life. From this judgment he appeals to this court, insisting that the statute referred to is unconstitutional.

The ground upon which the validity of the statute is assailed is that the increased punishment, by reason of the former convictions, is, in effect, a punishment a second time for offenses for which he has already been convicted and punished. But this is, in our judgment, not the effect of the statute. The increased punishment for a second or third conviction is simply the punishment for that offense, and the legislature may well increase the punishment in such cases to prevent a repetition

of offenses. This has been so often held that we do not regard it longer an open question: Taylor v. Commonwealth, 3 Ky. Law Rep. 783; Boggs v. Commonwealth, 9 Ky. Law Rep. 342, 5 S. W. 307; Chenowith v. Commonwealth, 11 Ky. Law Rep. 561, 12 S. W. 585; Combs v. [200] Commonwealth, 14 Ky. Law Rep. 245, 20 S. W. 268; 1 Bishop's Criminal Law, secs. 959, 965.

It is also insisted that appellant is not liable for the increased penalty imposed by the statute on a third conviction of felony, by reason of the fact that he was pardoned by the governor of the crime of which he was first convicted, and an instruction to this effect was asked and refused on the trial. This question was presented to this court in the case of Mount v. Commonwealth, 2 Duvall, 93, where it was held that the pardon had not this effect. The court said: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a different offense, committed after the pardon, and never pardoned. The increased punishment prescribed by the statute for the subsequent offense was no part of the penal consequences of the first offense, but applied exclusively to the last, as aggravated by its repetition of the same crime. The legislature, as required by justice and policy, ought to have provided a severer punishment for repeated than for only one crime; and whether it had done so, by duplicating for a second offense the punishment of the first, or by any other measure of augmentation, cannot be material. In any aspect, the augmented punishment is for the last, and not at all for the first, offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense, or remission of any portion of the punishment denounced for the perpetration of it." This case was afterward followed in Stewart v. Commonwealth, 2 Ky. Law Rep. 386, and it seems to us that the circuit court ruled properly in refusing the instruction asked.

The only other objection made that need be noticed [201] relates to the form of the verdict. It is insisted that the verdict is not sufficient, under the statute, to sustain the judgment. The statute is as follows: "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony, he shall be confined in the peni-

tentiary during his life. Judgment in such cases shall not be given for the increased penalty, unless the jury shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state": Ky. Stats., sec. 1130. The court below instructed the jury that, if they found the defendant guilty of malicious shooting, they should fix his punishment at confinement in the penitentiary for not less than one nor more than five years, unless they also found that he had been twice previously convicted of felony, as alleged in the indictment, in which case, if they found him guilty, they should fix his punishment at confinement in the penitentiary for life. Under these instructions the jury returned this verdict: "We, the jury, find the defendant, Ben Herndon, guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for life." It is insisted that, under the statute, the jury should find the fact of the former convictions, and that this verdict is not sufficient in this respect. But, under the instructions of the court, the jury could not have found their verdict in any other form than they did. Their finding the defendant guilty as charged in the indictment, and fixing his punishment at confinement in the penitentiary for life, was in effect, under the instructions, a finding of the former convictions. The purpose of the statute was to guarantee [202] to the defendant a trial by jury on this question, and this appellant has had. There was no doubt of the two previous convictions. Under the evidence, the jury could not have found otherwise, and we do not think the defendant's substantial rights have been prejudiced.

The judgment below must, therefore, be affirmed. The whole court considered this case.

A Statute Imposing a Heavier Penalty for an offense because of a prior conviction is constitutional: McDonald v. Commonwealth, 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; monographic note to In re Miller, 64 Am. St. Rep. 378-382.

LOUIS SNIDER'S SONS COMPANY v. ARMENDT.

[105 Ky. 317, 49 S. W. 10.]

LIMITATIONS—REPLEVIN BOND.—BRINGING A SUIT for discovery to enforce a replevin bond does not stop the running of the Kentucky statute of limitations against the surety. (p. 309.)

J. A. Dean, for the appellant.

Little & Little, for the appellee.

317 DuRELLE, J. In January, 1893, the appellant obtained a judgment against one Graham for some three hundred dollars and interest. In February an execution was issued, which was replevied by Graham, with Benson, Foor, and appellee as his sureties. The bond not being paid at maturity, execution was issued thereon on June 22, 1893, and returned "No property found." On November 23, 1893, the appellant instituted this proceeding by filing its petition in equity, under section 318 439 of the Civil Code of Practice, to enforce the satisfaction of the replevin bond, all the obligors therein being made defendants. Summons and attachment were served upon appellee, and upon a bank in Owensboro as garnishee. The answer of the bank averred that it owed none of the defendants, and had no property belonging to any of them. On October 22, 1894, a rule was taken against appellee to answer, but nothing appears to have been done with the rule. On December 27, 1894, an alias attachment was issued, and on January 4, 1895, levied upon certain personalty as the property of Armendt; but, upon his disclaiming ownership, it was not taken out of his possession. On January 19, 1895, an alias summons was issued, and served on Graham, the principal in the bond. The other two defendants have never been brought before the court.

On November 16, 1895, a rule was awarded against Graham and appellee; and on February 14, 1896, Armendt filed his answer, in which he admitted the execution of the replevin bond and the issuance of execution thereon on June 22, 1893, and pleaded that since the return of said execution no other execution had ever issued upon said bond; that at no time since that date had appellant's right to have execution thereon been obstructed or suspended, and that appellant, though entitled at all times to have execution upon said bond, had failed for the

space of one year to issue, or cause to be issued, execution upon the bond, or in good faith to prosecute the collection thereof.

A demurrer to Armendt's answer having been overruled, appellant filed a reply, in which, after pleading some matters, which are not material as to appellee, it was averred that, at the time of the execution of the replevin [319] bond, Foor was a nonresident of this state, and has ever since been absent therefrom, and that Benson and Graham soon afterward left the county and state, and Benson has never returned thereto, but his whereabouts have during all the time been known to "plaintiff." The reply further alleges the insolvency of Graham, Benson, and Foor during all the period since the execution of the bond, and that the bond was accepted upon the faith of Armendt's solvency alone, which was well known to him.

The reply further avers that, within one year after the maturity of the replevin bond, appellant brought a suit in Utah to enforce the payment of the bond, which has been diligently prosecuted, and was still pending, and also brought the present suit for a discovery.

A demurrer to the reply was sustained, and, appellant declining to plead further, the action was dismissed as to appellee. The sufficiency of the latter averment of the reply is the contention upon which this appeal is based.

The statute relied upon in the answer—being section 12 of chapter 104 of the General Statutes—is now embodied in section 4669 of the Kentucky Statutes, and is as follows: "If the plaintiff in any bond having the force of a judgment shall, at any time for the space of a year, whilst he is entitled to have execution, fail to issue execution, and in good faith prosecute the collection thereof, the surety in such bond shall be released from all liability as such, and any execution thereafter issuing on the bond shall be so indorsed." A number of cases have been cited on behalf of appellant to support the proposition that the pendency of the present suit stopped the running of the statute, notwithstanding the failure to issue execution and prosecute the collection thereof in good faith, inasmuch as the [320] inadequacy of the remedy by execution had been demonstrated. It is further urged that it is contrary to all rules of practice to hold that a right may be barred by the statute of limitations while an action is pending to enforce the right. The cases cited do not seem to us to sup-

port counsel's contention, which is, moreover, in direct conflict with one adjudged case.

Counsel cites the case of Barbee v. Pitman, 3 Bush, 259. In that case, the bond was a sale bond in an attachment suit, in which the attached property was sold pendente lite, and was payable to the officer "for such uses as may hereafter be adjudged by the Adair circuit court." The court, in an opinion by Judge Robertson, there held that: "This enactment applies only to bonds to beneficial creditors, who alone may control the collection by execution. It cannot be constructively applied to such judicial bonds as that in this case, the collection of which the court alone could control. The forbearance of the party who has a right to the money, and to either forbear or enforce the collection by execution, is the only reason for the enactment. There was no creditor who could issue execution, and none, therefore, whose forbearance could release the surety in the bond."

In the case of Rankin v. White, 3 Bush, 545, the bond was executed to the commissioner, for money which had been deposited for conflicting creditors, and lent by order of court; and this court, in an opinion by the same judge, construing the same section, held: "Neither the letter nor spirit nor aim of this section applies to judicial bonds, the collection of which, 'by execution, rule, or attachment,' must be controlled by the court alone, as to the time and manner of enforcement."

In the case of Haddix v. Chambers, 5 Bush, 171, the 321 statute was held, on the authority of the two cases just referred to, not to apply to a sale bond executed on a sale ordered by the chancellor, for the reason that "there is no effort to prove that the money had ever been adjudicated to William G. Haddix, nor any reason shown why he should control the execution; not even an effort to prove that the court had ever authorized or ordered the money to be collected."

The case of Newman v. Hazelrigg, 1 Bush, 412, has no application to the case at bar, though the question here presented was raised in that case, the sureties being held released upon another ground.

In Wintersmith v. Tabor, 5 Bush, 105, the bond was for money lent by order of court in a suit pending in equity, and was payable to the clerk, "for the benefit of such person or persons as the judge of the Hardin circuit court may adjudge, to have the force and effect of a replevin bond." The money was adjudged to be Tabor's, and Helm, the obligor, was di-

rected to pay it to him. More than a year after the judgment, a rule was taken against the surety in the bond; and in response thereto it was pleaded "that Tabor had sued out no execution, nor moved for a rule, for more than a year and a day after said bond became due." This court, through Chief Justice Williams, held the surety released from liability, by reason of the lapse of time without execution. But an expression used in the opinion is relied on as showing by analogy that the institution of a bill of discovery would stop the running of the statute. The expression was that, under the statute, Tabor "was bound to take out execution, or move for a rule against the principal and security within the year." But, the case referred to being in equity, the plaintiff in the bond was entitled to [322] proceed either by execution of fieri facias or by rule and attachment, the remedy by rule and attachment being, in our opinion, a form of execution appropriate for the enforcement of judgments in equity.

In the case of Counts v. Howis, 17 Ky. Law Rep. 1071, 33 S. W. 395, also cited by appellant, the question was whether an execution issued from the clerk's office of the circuit court upon a transcript of a judgment, execution and replevin bond from the quarterly court stopped the running of the statute; and that case, therefore, does not apply to the case at bar. But in White v. Moore, 18 Ky. Law Rep. 790, 38 S. W. 505, the question appears to have been directly settled against appellant's contention. In that case, it was held that the fifteen year bar of the statute of limitations applied to a judgment, notwithstanding the fact that before the fifteen years had elapsed an action in equity was instituted to subject certain property of the defendants in the execution to the satisfaction of the judgment, it being there held "that that action was merely a cumulative mode of securing satisfaction of the judgment, and did not have the effect to suspend plaintiff's right to successive executions, nor to stop the running of the limitation of the time within which they were required by the statute to cause execution issued, in order to prevent the bar to all proceedings on that judgment."

The terms of the statute under consideration are peremptory, and we do not feel authorized by construction to take from the surety the protection which it was evidently the legislative intent to give him. The judgment is therefore affirmed.

Limitations.—Bringing an action, though erroneous in form, will save a claim from the bar of the statute of limitations: Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. And an attempt to commence an action is equivalent to commencing it, so far as the statute is concerned: Fred Miller Brew. Co. v. Capital Ins. Co., 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023.

M. V. MONARCH COMPANY v. FARMERS AND TRADERS' BANK.

[105 Ky. 430, 49 S. W. 317.]

CORPORATION — COMMERCIAL PAPER.—As a general rule, a corporation has no power to guarantee commercial paper, unless the contract is reasonably necessary, or is usual in the conduct of its business. (p. 312.)

CORPORATION.—BECOMING SURETY OR GUARANTOR for the contract or debt of another is not, ordinarily, within the implied powers of a corporation. (p. 312.)

NEGOTIABLE INSTRUMENTS—TIME OF NOTICE OF DISHONOR.—The holder of commercial paper is not required to give notice of dishonor on the day the paper is protested, but may give notice on the first business day thereafter. (p. 314.)

NEGOTIABLE INSTRUMENTS.—THE MANNER OF GIVING NOTICE OF THE PROTEST of commercial paper, whether through the mail or by personal delivery from the notary, is not important. Notice in time is all that is required. (p. 314.)

NEGOTIABLE INSTRUMENTS.—AN INDORSER CANNOT ESCAPE LIABILITY on the ground that a prior indorsement by a corporation is ultra vires and not binding. (p. 315.)

Walker & Slack, Fairleigh & Straus, and Little & Little, for the appellants.

Sweeney, Ellis & Sweeney, for the appellees.

435 BURNAM, J. This action is upon a bill of exchange accepted by Slack & Perkins, drawn by the M. V. Monarch Company, and indorsed by M. V. Monarch and Mildred Perkins. Appellants, Slack & Perkins, the M. V. Monarch Company, and M. V. Monarch, filed a joint answer, in which joint and separate defenses are made. They jointly allege and plead 436 that the obligation sued on contains usury, and ask that it be eliminated. The M. V. Monarch Company and M. V. Monarch allege that the Monarch Company is a private corporation, having the power to manufacture and sell whisky and such other powers as are incident thereto; that it has no power to become the accommodation drawer or indorser upon

the paper of any other person or corporation; that its name was signed as drawer to the bill of exchange sued on, as a mere accommodation for Slack & Perkins, who discounted the bill with plaintiff, and received the entire proceeds arising therefrom; that the signing of the name of the M. V. Monarch Company as drawer of the bill, and the indorsement of same by M. V. Monarch, were without consideration, and that this fact was known to the plaintiff at the time it discounted the original bill and at the time it accepted each bill in renewal thereof; that at the date of the maturity of the bill sued on the M. V. Monarch Company had its business office in the city of Owensboro, and that plaintiff and the notary public who protested the bill knew this fact; that M. V. Monarch had his office in Owensboro, but resided outside the city limits; that the notary, at 6 o'clock P. M., on December 27, 1895, the date of the maturity of the paper sued on, placed a notice of protest in the postoffice at Owensboro, addressed to the M. V. Monarch Company, and also a notice addressed to M. V. Monarch, Owensboro, Kentucky; that by reason of these notices having been deposited in the postoffice they were not received until some time during the next day, December 28, 1895, and that the notices could have been delivered to each of these defendants on the day of the maturity of the bill, at their respective offices; and these facts are pleaded by way of avoidance of the obligation sued on. Mildred Perkins, the last indorser, [437] pleads in her answer that she was a mere accommodation indorser upon the bill; that the indorsement of the M. V. Monarch Company was ultra vires, and that it is not bound thereby; and by reason thereof she claims that, under the statute, she is released. A general demurrer was sustained to the answers of the M. V. Monarch Company, M. V. Monarch, and Mildred Perkins, as to all the defenses relied on except that of usury; and, the defendants failing to plead further, a judgment was rendered against all the defendants for the debt sued on, after eliminating the usury it contained; and we are asked upon this appeal to reverse that judgment, on the ground that the court erred in sustaining the demurrer as to each defense relied on by defendants.

We will consider these defenses seriatim. First, is the M. V. Monarch Company liable as an indorser under the allegations of the answer, which, upon demurrer, must be taken as true? As a general rule, a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise

lend its credit to another, unless such contract is reasonably necessary, or is usual in the conduct of its business. Ordinarily, the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation. The reason for this rule is that such a contract risks the capital and funds of the corporation in an enterprise not contemplated by the stockholders in subscribing for or purchasing its stock, prejudices the rights of its creditors, and exceeds the authority conferred by its charter: See 7 Am. & Eng. Ency. of Law, 2d ed., 778. The reason for this rule was well expressed in Todd v. Kentucky Union Land Co., 57 Fed. 51, where it is said: "1. The corporate funds belong to its shareholders, and, by the [438] very terms of the law creating it, cannot be devoted to any other purposes than those indicated by its charter. Such obligations would violate the fundamental terms of the agreement between the corporators themselves. 2. To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchise is for the purposes prescribed, and the execution of such obligations would be beyond the power conferred, and therefore a diversion of the corporate purposes as well as of the corporate funds."

Thompson, in his Commentaries on the Law of Corporations (section 5721), says: "With the exception of those corporations—such as trust and guaranty companies—which are organized for the express purpose of becoming sureties for other persons or corporations, and with other exceptions elsewhere stated, it may be laid down, as a general rule, that no corporation has the power, by any form of contract or indorsement, to become a guarantor or surety for, or otherwise lend its credit to, another person or corporation." And in section 5723, in assigning the reasons and limitations, he says: "This principle is designed for the preservation of the funds of the corporation, for the benefit of those having an interest in them, by preventing them from being embarked in enterprises not authorized by the charter or governing statute. Those persons are primarily the stockholders as long as the corporation continues a going concern, and it is their right that the corporate funds shall not be put to hazards or embarked in an undertaking not authorized by the contract of association. If the doctrine that the capital of the corporation is a trust fund, for the security of its creditors, is any more than an empty

and idle collection of words, then the principle is also designed for the security of the creditors of the corporation, [439] by preserving from an unauthorized dissipation a fund which, in the event of insolvency, equity impresses with a trust in their favor."

There are, however, some exceptions to this general rule, and in a number of cases, where such contracts have been shown to be of manifest advantage to a corporation, they have been enforced: See 4 Am. & Eng. Ency. of Law, 727-729; Fuld v. Burr Brewing Co., 45 N. Y. St. Rep. 649, 18 N. Y. Supp. 456; Holmes v. Willard, 125 N. Y. 75, 25 N. E. 1083. But there is nothing in the allegations of the petition which brings the M. V. Monarch Company within the announced exceptions to the general rule, and the court erred in sustaining the demurrer to the plea of ultra vires relied on by the corporation.

The next question presented is, Was M. V. Monarch entitled to a personal service of notice of protest, and if so, did the failure of personal service release him, and was the notice given in due time? In Neal etc. v. Taylor, 9 Bush, 384, in construing the third section of the act of January 16, 1864, prescribing the duties of notaries public in protesting negotiable paper in order to fix the liability of the parties thereto, this court said: "It was evidently intended by this enactment to alter the law-merchant in regard to giving notice of the protest of commercial paper, but the act itself is so indefinite in its mandatory clause that judicial construction was made necessary in order to enable notaries to know what their legal duties were by reason of its provisions. The act required the notary, when he knows the place of residence of the parties to the bill, to give or send the notices to them, and not to the holder of the paper; but whether he is to deliver the notices in person or send them by mail or private hands on the day of the protest, or the next day, or in a reasonable time, [440] is nowhere stated. The notary is left in entire ignorance as to the obligation it imposes. This court, in the opinion rendered in Todd v. Edwards, 7 Bush, 93, was enabled, by the aid of the law-merchant in connection with the act in question, to give it the only reasonable construction to which it was susceptible, and that was: 'Where parties to negotiable paper were entitled to notice in order to hold them liable, and lived in the same town or city where protest was made, there should be a notice in person delivered by the notary, or left at the dwelling or business house of the party sought to be charged.

The law, in such a case, requires that this notice should be delivered either on the day of dishonor of the paper or before the expiration of the business hours of the succeeding day.'"

And in Bondurant v. Everett, 1 Met. (Ky.) 658, this court held "that where the party sought to be charged as drawer or indorser of a bill live near to, but not in or at, the place of dishonor, and the postoffice at that point is the office where he usually receives his letters or the nearest office to his residence, notice must be given to him by letter, through such office."

There are numerous adjudications holding that the rule as to personal notice is to be restricted to cases where the party to be affected by the notice resides within the limits of the city or town in which the note is protested, and if he resides in the country outside of those limits, but receives his mail at the postoffice at that town, a service by mail is sufficient: See Ransom v. Mack, 38 Am. Dec. 611. But it seems to be the settled rule that the holder of commercial paper is not required to give notice of dishonor on the day the paper is protested, but may give notice on the first business day thereafter, and such notice is sufficient: See 5 Am. & Eng. Ency. of Law, 2d ed., [441] 528; 2 Daniel on Negotiable Instruments, 84. The answer of appellant shows that he received the notice of protest of this paper on the first business day after it was protested, and we do not think it is a matter of any importance whether he received it through the mail or by personal delivery directly from the hands of the notary. The fact that he got the notice in time is all that is required.

In discussing this question, 2 Daniel on Negotiable Instruments, page 56, says: "If the party receives the notice, the mere manner of its transmission is wholly immaterial. A personal service of notice is good wherever it may be made, provided it be done in proper time. At an improper place, it is sufficient if it reaches the party for whom it was intended in due season. And so, likewise, if it be sent by mail, where the parties reside in the same place, it is good if it duly reaches the party addressed. The distinction between the different modes of giving notice is this: Where the holder and indorser reside in different places, the former, if he deposits the notice in the postoffice in due season, has no further burden on him as to the actual receipt of it by the latter; but where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due

season." We think the law was fully complied with so far as the notice is concerned.

The last question to be considered is that raised by the answer of Mildred Perkins; that is, Can she escape liability on the paper because the act of the corporation in becoming a drawer of the bill was ultra vires? We think not.

2 Randolph on Commercial Paper, section 742, says: "The indorser, by placing his name on the back of a bill of exchange, note, or check, undertakes: 1. That it shall be [442] accepted and paid according to its tenor, on due presentment and notice of dishonor; 2. That the instrument, and the signatures of all prior parties thereon, are genuine; 3. That the instrument is valid according to its purport; 4. That the parties to it are competent to contract; 5. That the indorser has the title and right to transfer. The indorsement of a bill, when delivered, implies a warranty or promise that it shall be paid on condition of due presentment and notice of dishonor. If the bill is payable in future, he undertakes that he will pay it with damages, if the drawee fails on presentment, and he is duly notified of such failure."

Generally, an indorser of a negotiable instrument warrants to a bona fide holder the existence of every essential necessary to constitute the instrument a valid and subsisting obligation. It is a part of the contract of indorsement that the paper indorsed has been made by a person competent to contract in that form: See Archer v. Shea, 14 Hun, 493; Kenworthy v. Sawyer, 125 Mass. 28; Ross v. Dixie, 7 U. C. Q. B. 414. It seems clear, from the authorities on this question, that the liability of appellant Mildred Perkins is not affected by the failure of the M. V. Monarch Company to become liable upon its indorsement.

For the reasons indicated herein the judgment is reversed upon the appeal of the M. V. Monarch Company, and affirmed as to the other appellants, and the cause is remanded for proceedings consistent with this opinion.

It is Ultra Vires of a Corporation to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so: See the monographic notes to In re Assignment Mutual etc. Ins. Co., 70 Am. St. Rep. 164; Altoona Second Nat. Bank v. Dunn, 31 Am. St. Rep. 753. Consult, also, City etc. Ry. Co. v. First Nat. Bank, 62 Ark. 33, 54 Am. St. Rep. 282, 34 S. W. 89; Best Brew. Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26, 57 N. E. 20.

Bills and Notes—Notice of Dishonor.—A notice of the protest of a bill of exchange mailed by the notary the next day after the protest is made is mailed in time: Brown v. Jones, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452. Notice of nonpayment may be either verbal or in writing: Glasgow v. Pratte, 8 Mo. 336, 40 Am. Dec. 142. As the object of notice is always to give information, if the required information actually reaches the party to be notified, it is sufficient, however communicated. Hence, whatever mode of service of notice of dishonor may be adopted, if the notice actually comes to the indorser or drawer in due season, from the proper quarter, and in correct form, it is valid and effectual: See the monographic note to Ransom v. Mack, 38 Am. Dec. 607.

FIGG v. THOMPSON.

[105 Ky. 509, 49 S. W. 202.]

MUNICIPAL CORPORATION—LICENSE TO CONTRACTORS.—A municipal ordinance requiring those engaged in contracting for public, municipal, railroad, or bridge work to pay a license fee is unconstitutional. (p. 319.)

Lane & Burnett, for the appellant.

C. A. Wilson and H. L. Stone, for the appellees.

509 GUFFY, J. It is alleged in the petition in this action that by section 35 of an alleged ordinance of the city of Louisville, approved April 1, 1896, entitled "An ordinance providing for certain licenses for the sinking fund of the city of Louisville," it is, among other things, ordained that every person, firm, or corporation engaged in the business of contracting for public, municipal, railroad, or bridge work shall pay a license fee of one hundred dollars per annum; and by section 41 of the alleged ordinance it is ordained that "all licenses shall be paid for in advance in lawful money of the United States, and it shall be unlawful for any firm, person, or corporation to carry on the business, occupation, or profession, or to use or exhibit any articles therein mentioned, in the city of Louisville, without first having paid the license herein required for the same"; and by section 44 of said ordinance it is ordained that "any person, firm, or corporation violating any of the provisions of this ordinance, where a different fine has not been provided for, shall be fined not 510 less than five, nor more than one hundred, dollars for each offense"; and by section 1 of said ordinance it is ordained that said

license fee shall be paid to the sinking fund commissioners of the city of Louisville for the purpose of the sinking fund of the city of Louisville. And the plaintiff says that by the alleged ordinance no penalty or fine is prescribed other than is provided in section 44, as herein set out, that plaintiff is engaged in the business of improving by original construction the carriage way of public streets and alleys, and of improving by original construction and reconstruction the public sidewalks of and in the city of Louisville. It is further alleged that when the board of public works orders any work to be done which is authorized by order of said board, or according to law is to be performed by independent contract, said board prepares and places in the office of said department a complete drawing and specification of said work. Thereupon said board causes a notice to be published in a newspaper published in said city once a week for two weeks, informing the public of the general nature of the work, calling for sealed proposals for said work by a day not earlier than ten days after the first of said publication. "Said board shall, if a satisfactory bid be received, let said contract to the lowest bidder." It is further alleged that improvements as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and that the cost of the improvement of the carriage ways in the construction and reconstruction thereof shall be apportioned against and paid for by the owners of the lots in the tax limits thereof as defined in said acts, and the improving of sidewalks and improving the curbing thereof by original construction and reconstruction shall be apportioned [511] against and paid for by the owners of the ground fronting the improvements according to the number of front feet of their lots fronting the improvements respectively. It is further alleged that the ordinance aforesaid is void, because it is in violation of the provisions of an act approved July 1, 1893, in this: That said ordinance limits the right to contract in the city of Louisville for the improvement or original construction of the carriage ways of the streets and lots in the city of Louisville, and for improvement by original construction or reconstruction of the public sidewalks in the city of Louisville to such persons only as may pay to the city of Louisville a bonus for such privilege in the shape of one hundred dollars per annum as a license so to do. It is further alleged that the ordinance is unconstitutional and void, because it limits the right to submit to the city of Louisville proposals to

make such improvements, and limits such proposals to such persons only as pay said city of Louisville one hundred dollars per annum for the privilege of so doing. It is further averred that there is in law no such organization as the sinking fund commissioners of the city of Louisville, and that, therefore, the ordinance requiring such tax to be paid to such corporation is null and void. The petition further sets out the fact that the plaintiff was prosecuted in the city court of Louisville, charged with the offense of having violated the ordinance complained of, and fined therefor; and under the provisions of section 163 of the act approved July 1, 1893, for the government of cities of the first class, this plaintiff brought this suit in the Jefferson circuit court, law and equity division, and prayed for a writ of prohibition restraining the police judge, R. H. Thompson et al., from further prosecuting said case against plaintiff.

A demurrer was sustained to plaintiff's petition, and [512] judgment rendered dismissing the same, and denying the writ of prohibition, and from that judgment this appeal is prosecuted.

It is earnestly insisted for appellant that there is in law no such corporation or organization as the commissioners of the sinking fund of the city of Louisville. That the expression of the act of July, 1893, which says that "The board of sinking fund commissioners is hereby continued under the existing law," is void, and of no effect, and is in violation of sections 51-59 and 167 of the constitution. But, inasmuch as said sinking fund commissioners are not parties to this suit, nor does it appear that they are seeking to enforce the collection of the tax, nor the fine imposed by the police court, we deem it unnecessary to enter into a discussion as to the fact whether there are any legal commissioners of the sinking fund of the city of Louisville.

From the allegations made in the petition it seems clear to us that the imposition of the license tends to increase the expenses incident to the improvement of sidewalks, streets, etc., and would be imposing additional burdens upon property owners fronting on such improvements. It is also manifest that the imposition of such license is inconsistent with the general law and ordinance providing that such improvements or work should be let to the lowest responsible or reliable bidder, and for that reason must be held to be illegal and invalid. It is manifestly just and right that all improvements made,

the cost of which is to be taxed against the property owners, should be made at the least possible cost; and it is equally manifest that such ordinance as the one in question tends to lessen the number of persons who would be inclined to file bids or propositions for doing work, and tends to create a monopoly in the business of public works. It is also [513] reasonable that the amount paid for license would increase the cost of the improvements, and thus the property holder would be made to pay not only for what it cost to make the improvements, but also to pay his part of the license fee required of the contractor, which would be manifestly unjust and illegal. It must be conceded that to pay for the improvements is sufficiently onerous upon the property holder, without also having added thereto a special license to the city as a privilege to the contractor to do the work and charge therefor. It is evidently contrary to natural justice that a city should order improvements to be made at the cost of the abutting property owners, and then add thereto a license fee to the contractor for the benefit of the city at large, which license fee the contractor, according to the well-known rules of business, will estimate in the sum for which he undertakes to do the work.

That such license fee as that under consideration tends to lessen the number of bidders, and consequently increase the cost of such improvements, is not open to serious question, and it seems to us unreasonable that the city should order improvements to be made, and then impose a license tax upon the party who undertakes to do the work. Hence, it follows that any ordinance or act of the legislature authorizing or imposing any such license fee is unconstitutional and invalid. The prohibition asked for should have been granted.

For the reasons stated, the judgment appealed from is reversed, and the cause remanded, with directions to award the writ of prohibition, and for proceedings consistent herewith.

Licensing Callings and Businesses.—In Bitzer v. Thompson, 105 Ky. 514, 49 S. W. 199, a municipal ordinance requiring every person, firm, or corporation buying claims to pay an annual license fee is held unconstitutional. "We are of the opinion," says Judge Guffy, in delivering the opinion of the court, "that the ordinance or statute which requires the license to be paid as a condition precedent to a citizen buying a claim or claims is unconstitutional and void. It is doubtless true that, if a person was engaged in the general business of brokerage, or making it his business to buy general claims, it would be competent to impose a license fee; but, according to the averments in this petition, the appellant was only purchasing claims on the city of Louisville, which were admitted by said city to be just

and due, and it would seem that it would be unreasonable to impose a license tax upon a citizen who merely wanted to buy a few claims, or some of a particular class, as an investment. It would also be injurious to the claimant, whose claim could not be paid when due, to require a tax to be paid to the same authority who owed the claim before the purchaser could be allowed to buy the same. The tendency of such a license would be to impose a hardship upon the claimant as well as upon the purchaser, and it seems that public policy forbids the imposition of any such tax or restriction in regard to the purchase of such claim. Such license would tend to lessen the value of the claim which the city had undertaken to pay at maturity, and consequently would enable the city to derive a profit or revenue from its own laches, and would tend to lessen the number of claim buyers, and, as a consequence, cheapen the claim, and thereby wrongfully injure the credit of the city."

To justify an ordinance licensing a particular occupation as a proper exercise of the police power, it must appear that the requirement of such license tends to promote the public health, morals, safety, comfort, or welfare, or to suppress disease: Wilkie v. Chicago, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004. For further illustrations of the power to impose license fees and taxes on persons following certain occupations, see the recent cases of State v. Hunt, 129 N. C. 686, 85 Am. St. Rep. 758, and cross-reference note thereto, 40 S. E. 216; Commonwealth v. Clark, 195 Pa. St. 634, 86 Am. St. Rep. 694, and cross-reference note, 46 Atl. 286.

DAWSON, BLACKMORE & COMPANY v. ELROD.

[105 Ky. 624, 49 S. W. 465.]

PARTNER—LIMITING LIABILITY OF.—A person selling goods to one partner on credit cannot bind the other partner after notice that he will not be bound. And this, though the goods come to the firm and are used by it. (pp. 321, 322.)

O. H. Waddle, for the appellant.

James Denton and James R. Cook, for the appellee.

625 WHITE, J. This action was instituted in the Pulaski circuit court by the appellant against appellee and W. F. Hansford, as partners under the style of Walter Elrod & Co., upon an account of goods and merchandise sold to that firm. Hansford made no defense. Appellee Elrod admitted the sale and delivery of the goods charged for to Hansford, and that they were used by the firm, but denied liability therefor, for the reason, as alleged, that before the goods were sold or delivered by appellant, he (appellee) notified appellant that he would not be bound to pay for any purchases made by Hansford on a credit or on time, and that appellee also notified

Hansford not to buy any goods except for cash, to be paid for on delivery; that notwithstanding this notice to both Hansford and appellant, these goods were sold and delivered by appellant to Hansford, who had charge of the business, all of which was done without appellee's knowledge or consent, but against his express wishes. To this answer a reply of denial of notice was filed. On this issue the case was tried before a jury, which resulted, after a mistrial and a second jury, in a verdict for appellee. Appellant's reasons and motion having been overruled, this appeal is prosecuted.

On the question of fact the jury might have concluded either way, so close was the testimony; and their finding will not be disturbed, if they were properly instructed. The court gave one instruction as follows: "If you believe from the evidence that defendant Elrod, before the fifth day of April, 1894, gave notice to Adams not to sell Hansford any more goods on credit, you will find for defendant; but unless you so believe from the evidence, [626] you will find for plaintiff." It was shown that the sale was made by Adams, agent and stockholder in appellant company. We are of opinion that this instruction embraced the law of this case. The rule of law that one partner can bind all the members of the firm about matters within the scope of the partnership business rests upon agency, the principle being that all the partners have agreed that he should do so. This agreement to be bound by the acts of one within the scope of the business is implied by law from the very nature of the association, and from the customary course of dealing. But a partnership may be dissolved, and then the power to bind all ceases after notice of dissolution. Likewise it seems clear that notice that the authority to bind all did not exist in one partner would relieve from liability the other partner, just as after dissolution he is no longer bound. The partner selling or trading with one partner cannot bind the other partner after notice that he will not be bound. It is notice that the implied agency had ceased. Nor do we think this rule is changed by the fact that the goods came to the firm, and were used by the firm. This might have been the very thing that the appellee did not desire, and the very thing he undertook to guard against; yet if the acts of his partner against his wishes and over his protest, in receiving the goods and using them, can bind appellee to pay for them, the notice to appellant might as well not have been given. The effect of the notice, if given, must be to put the seller on notice that,

"if you sell over my protest, in no event will I be liable." This view is sustained by Monroe v. Conner, 15 Me. 178, 32 Am. Dec. 148. The instruction being in accordance with these views, and the verdict not being against the decided weight of the testimony, the judgment is affirmed.

THE POWER OF ONE PARTNER TO RESTRICT OR WITHDRAW THE AUTHORITY OF THE OTHER TO ACT FOR THE FIRM.

I. Limiting Partner's Authority Generally.

II. Form and Notice of the Limitation.

III. Effect of Receiving Benefits of Transaction.

IV. Firm of More than Two Members.

V. Revoking Authority to Receive Payment.

I. Limiting Partner's Authority Generally.

The law of partnership is a branch of the law of principal and agent. A partner embraces both characters. He is at once the principal and the agent of his copartners. In all matters within the scope of the partnership business each partner is the general agent of the others, with the right and power to bind them and the firm: Edwards v. Dillon, 147 Ill. 14, 37 Am. St. Rep. 199, 35 N. E. 135; Western Stage Co. v. Walker, 2 Iowa, 504, 65 Am. Dec. 789; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Loudon Sav. etc. Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Cox v. Hickman, 8 H. L. Cas. 268, 9 Com. B., N. S., 47.

This authority, however, to act as agent for the firm in partnership transactions is, like the authority of agents in general, only prima facie. One partner may revoke it entirely by withdrawing from the firm and giving due notice to third persons that he will no longer be bound by the acts of his copartners: Ach v. Barnes, 21 Ky. Law Rep. 893, 53 S. W. 293; Ellison v. Sexton, 105 N. C. 356, 18 Am. St. Rep. 907, 11 S. E. 180; notes to Prentiss v. Sinclair, 26 Am. Dec. 290; Gilmore v. Ham, 40 Am. St. Rep. 573. Or he may, while remaining member of the firm, place limitations on the authority of his copartner to bind him, either generally or as to particular transactions. And when third persons dealing with his copartner have notice of such limitations, he will not be answerable in respect to transactions in which he has placed it beyond the authority of his copartner to represent him. One partner is not bound by a contract entered into by the other with a third person after giving actual notice to the latter that he will not be bound thereby. This is notice that this agency, at least to that extent, has ceased: Wilcox v. Jackson, 7 Colo. 521, 532, 4 Pac. 966; Leavitt v. Peck, 3 Conn. 125, 8 Am. Dec. 157; Knox v. Buffington, 50 Iowa, 320; Matthews v. Dare, 20

Md. 248; Cargill v. Corby, 15 Mo. 425; Johnson v. Haws, 62 N. Y. Supp. 641, 47 App. Div. 597, affirmed in 168 N. Y. 654, 61 N. E. 1130; Johnston v. Bernheim, 86 N. C. 339, 341; Yeager v. Wallace, 57 Pa. St. 365; Galway v. Matthew, 10 East, 264, 1 Camp. 403; Vice v. Fleming, 1 Younge & J. 227.

II. Form and Notice of the Limitation.

This limitation on the authority of a partner to act for the firm may rest on mutual agreement between the partners: Urquhart v. Powell, 54 Ga. 29; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Baxter v. Clark, 4 Ired. 127, 129. Or the limitation may be imposed by a stipulation in the articles of partnership: Radcliffe v. Varner, 55 Ga. 427; Lee v. National Bank, 45 Kan. 8, 25 Pac. 196; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358; Pollock v. Williams, 42 Miss. 88; Hastings v. Hopkinson, 28 Vt. 108. Or the limitation may be simply by notice to copartners and third persons: Dawson, Blackmore & Co. v. Elrod (the principal case), 105 Ky. 624, ante, p. 320, 49 S. W. 465; Feigley v. Sponeberger, 5 Watts & S. 564. But whatever may be the form of the restriction or the withdrawal of a partner's authority to perform those acts falling within the scope of the partnership business, actual notice thereof must be brought to parties dealing with the firm. Otherwise they have a right to assume that the authority of a partner is coextensive with the business transacted by his firm. All of the above cases recognize this principle. Secret limitations or those of which third persons have no knowledge can be of no avail: Bass Dry-Goods Co. v. Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471; Crane Co. v. Tierney, 175 Ill. 72, 51 N. E. 715; Miller v. Hughes, 1 A. K. Marsh. 181, 10 Am. Dec. 719; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Lynch v. Thompson, 61 Miss. 354; Frost v. Hanford, 1 E. D. Smith, 541; Bank of Rochester v. Monteath, 1 Denio, 406, 43 Am. Dec. 681; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036. Moreover, the fact that one partner objects to a proposed contract does not prevent its becoming binding on him when made: Tyler v. Tyler, 78 Mo. App. 240; Wilkins v. Pearce, 5 Denio, 541.

III. Effect of Receiving Benefits of Transaction.

In Willis v. Dyson, 1 Stark. 164, it is said that "after notice by one partner not to supply any more goods on the partnership account, it is necessary for the party sending goods after such notice to prove some act of adoption by the partner who gave the notice, or that he had derived some benefit from the goods." And in Johnston v. Bernheim, 86 N. C. 339, it is decided that a partner who is not bound by the act or contract of his associate in its inception because of a limitation placed upon his authority, assumes the obligation when he takes the benefit of the property acquired; and that it is immaterial whether the benefit accrues to him separately and peculiarly or to the firm. Obviously, there may be a wide difference,

in the case of a purchase of goods, between the goods coming to the use of the firm, and an actual benefit accruing therefrom. The adventure may prove a losing one. It seems reasonable that if a partner can limit his liability by giving notice that he will not be bound, then he can make his nonliability absolute, at least so far as not to be dependent on whether the thing contracted for comes to the use of the firm. If he cannot, he might as well have not dissented: Dawson Blackmore & Co. v. Elrod (the principal case), 105 Ky. 624, ante, p. 320, 49 S. W. 465; Monroe v. Conner, 15 Me. 178, 32 Am. Dec. 148.

IV. Firm of More than Two Members.

The only restriction which the law places upon the control of partnership affairs by a majority of the members of the firm is that they act in good faith: Western Stage Co. v. Walker, 2 Iowa, 504, 65 Am. Dec. 789. When a partnership consists of more than two persons, there is an implied understanding, in the absence of stipulations in the partnership articles to the contrary, that the acts of the majority as to all matters within the scope of the common business shall bind the firm. And if, in such case, one partner gives notice of his dissent to the party with whom a contract is about to be made, he is nevertheless bound by the act of the other partners: Johnston v. Dutton, 27 Ala. 245.

V. Revoking Authority to Receive Payment.

Thus far we have considered the authority of one partner to withdraw or restrict the authority of his copartner only in respect to executory contracts or prospective transactions. The payment of an existing debt to one, notwithstanding the request of the other partner that it should not be so paid, is quite another matter. One partner cannot revoke the authority of his copartner to collect firm debts simply by notifying their debtors not to pay his partner: Noyes v. New Haven etc. R. R. Co., 30 Conn. 1, 14; Steele v. First Nat. Bank, 60 Ill. 23. And this rule obtains after the dissolution of the partnership: Granger v. McGilvra, 24 Ill. 152. Still the partners may agree as between themselves that one only shall have authority to settle and discharge debts, and a debtor of the firm, with notice of such agreement, is bound by it: Clark v. Lauman, 63 Ill. App. 132; Gram v. Cadwell, 5 Cow. 489.

BROWN v. DALTON.

[105 Ky. 609, 49 S. W. 443.]

WIFE'S CONTRACT WITH HUSBAND—CONFLICT OF LAW.—A contract between a husband and wife made in Kentucky, in which state they are domiciled and under whose laws she is incompetent to make such contract, whereby he conveys land to her in Virginia and she assumes a debt of his there payable, cannot be enforced against her in Kentucky, though it may be valid in Virginia. (pp. 325, 328.)

Gaither & Vanarsdall, for the appellant.

Thompson & Wilson, and Charles T. Corn, for the appellees.

670 HOBSON, J. This is an action by appellant to recover of appellee the amount of a note, dated January 25, 1890, executed at Big Stone Gap, Virginia, by appellant, for five hundred and thirty-three dollars and thirty-three cents, payable at the Bank of Big Stone Gap, Virginia, and due in twenty months after date. It is alleged in the petition that the note is a part of the purchase money for some lots in the town of Big Stone Gap, which were conveyed to appellant on the date of the note; that on February 20, 1890, appellant conveyed the property to J. M. Dalton, and as a part of the consideration for the conveyance, J. M. Dalton assumed the payment of this note; that on December 1, 1890, J. M. Dalton conveyed the property to appellee, 671 J. C. Dalton, by deed, which she accepted and put to record in Virginia, in which she assumed the payment of the note; that she failed to pay it; that appellant had been sued upon it, and had paid it; and that the property for which it was given, and on which a lien was retained to secure it, had been sold, and only satisfied a small part of the note. It also appears that appellee, J. C. Dalton, is the wife of J. M. Dalton, and was his wife when all these transactions took place; that their home is, and during all this time has been, at Harrodsburg, in this state; and that the transaction between appellee and her husband, by which the land was conveyed to her and she assumed the payment of this note, was made there. It is alleged that by the law of Virginia a married woman at this time had the right to contract as a feme sole, and it is insisted that this is a Virginia contract, as the land lay in Virginia, and the note which appellee assumed was payable there, and that, being a Virginia contract, and valid there, it may be enforced in this state, although appellee,

at the time of its execution, was a married woman domiciled in this state, without capacity to make such a contract by the laws of this state. On the other hand, it is contended for appellee that appellant has no privity with her, and cannot sue her upon the contract; also, that as the contract was in fact made in Kentucky by the wife with her husband, at the place of their domicile in this state, the courts of this state will not enforce the contract against her.

Without considering the first objection, we will take up the second, which seems to us decisive of the controversy. If appellant has any cause of action by reason of the contract made by appellee with her husband, J. M. Dalton, it is clear that she can have no better right than [672] J. M. Dalton has, and that if J. M. Dalton, on the facts alleged, could not maintain an action, then neither can appellant. The question, therefore, is, Could J. M. Dalton maintain an action against his wife on the covenants of this deed, and recover a personal judgment against her?

How far the courts of a state, where the common-law rules of coverture prevail, will enforce personally against a married woman a contract governed by the laws of another state, where she is allowed to contract as a feme sole, is a question on which the courts are not agreed. In Milliken v. Pratt, 125 Mass. 374, 28 Am. Dec. 241, such a contract was sustained, on the ground that the common-law rule of the total incapacity of a married woman to contract had been changed by the statute in Massachusetts; but it was said by the court that where the incapacity of a married woman is the settled policy of the state, for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state, in which she might undertake to contract. In the subsequent case of Armstrong v. Best, 112 N. C. 59, 34 Am. St. Rep. 473, 17 S. E. 14, the precise question suggested in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, came before the court, married women in North Carolina standing under the law just as in Kentucky. The court refused to enforce the contract against the married woman, on the ground that the common-law disability of a feme covert still obtained, and that she could not charge her property, except as provided by law.

Among other things, the court said: "In Johnston v. Gawtry, 11 Mo. App. 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract

in another state, her capacity to make the contract and its validity [673] are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract. In Bank of Louisiana v. Williams, 46 Miss. 618, 12 Am. Rep. 319, the contract was made in Louisiana, where it would have been valid against the feme defendant. The suit was brought in Mississippi, the place of her domicile, and under whose laws the contract was void by reason of her coverture. The opinion of the court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The court said: 'It is the prerogative of the sovereignty of every country to define the condition of its members—not merely its resident inhabitants, but others temporarily there—as to capacity or incapacity. But capacity or incapacity as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not, in the forum of his domicile, as they may infringe or not its interests, laws, and policies.'"

Under the laws of Kentucky at the time of this transaction, the appellee, Mrs. Dalton, was under the power of her husband. She had no separate legal existence. All her personal property vested in him upon their marriage. He was entitled to the rents on her real estate, and she could not charge it, except for necessaries. Her husband was constituted by law her protector, and no contract between him and her could be enforced against her. In Scarborough v. Watkins, 9 B. Mon. 545, 50 Am. Dec. 528, this court said: "It is a maxim of the common law that the husband and wife cannot make a valid contract with each other during the coverture. The reason generally assigned is that, the wife having lost her legal unity, she and her husband are one person, in legal contemplation, [674] and it would be absurd for any person to enter into a contract with himself. This, however, is not the true reason. The true reason of the rule is that the wife is under the coercion of the husband, and, being thereby deprived of the freedom of volition, should not be bound by her contracts with him."

In Orr v. Orr, 8 Bush, 159, the husband had conveyed land to the wife upon her agreement to pay certain money. She failed to pay it, and this was relied on to show a failure of consideration; but it was held that the promise of the wife to the husband imposed no legal obligation, and her failure to comply with the promise did not affect the deed. As J. M. Dalton

and wife, at the time of the transaction in contest, were domiciled in this state, had been married here, and had always lived here, and he had control not only of the wife's person, but possession of all her property, with the power to control her actions, it seems clear that the courts of this state should not enforce any contract made by her with him during this relationship. This transaction is clearly contrary to the public policy of this state, as defined in the statutes in force when it was made, and, if it could be enforced, the door might be open for grave abuses. The wife was entitled, not only to the protection of the husband, but to his counsel and guidance in the management of her affairs, and she had learned that it was her duty to submit to him. If, when the law had imposed this duty upon her, it shall allow him to make contracts with her to pay his debts, and enforce these contracts against her, because the debt is payable in another state, it will defeat the purposes of the statute framed to protect married women, and prevent their property being wasted.

Appellant was no party to this contract. We do not 675 see that he has been injured in any way, and as the husband could not be permitted to maintain this action against his wife, the court below properly sustained a demurrer to appellant's petition.

The judgment is therefore affirmed.

Married Woman's Contracts.—Some courts hold that if a married woman's contract relating to real estate is valid by the law of the place where the property is situated, it will be enforced, though by the law of the place where it was made and where she lived it is void by reason of her personal disability: See the monographic note to Locke v. McPherson, 85 Am. St. Rep. 554, on conflict of laws as affecting the rights and obligations of married women.

UTTERBACK v. COMMONWEALTH.

[105 Ky. 723, 49 S. W. 479.]

CRIMINAL TRIAL — IRREGULAR ARRAIGNMENT. — If some of the evidence is introduced before the indictment is read and a plea entered, and the state's attorney afterward reads the indictment to the jury in the presence of the defendant, the irregularity is waived by his entering a plea without objection, and consenting that the testimony already given be considered without being reintroduced. (p. 330.)

HOMICIDE IN DEFENSE OF PROPERTY.—In case of a controversy over land, life can be taken only in self-defense or in the necessary defense of others. It cannot be taken to prevent a trespass. (pp. 333, 335.)

HOMICIDE—DEFENSE OF PROPERTY.—THE LAW OF DEFENSE OF HABITATION is not applicable to the protection of property. (pp. 333, 335.)

HOMICIDE — SELF-DEFENSE — INTERVENTION OF THIRD PERSON.—If, after the commencement of a combat over land, the defendant's son appeared on the scene, and on a resumption of the shooting the fatal shot was fired in his defense, the court should instruct the jury that if the defendant began the difficulty, or if he and the deceased went upon the premises determined on a conflict, and the conflict was by mutual consent, the defendant could not rely on the right of self-defense, unless he withdrew from the conflict and afterward re-engaged in it only in defense of his son. (pp. 332, 335.)

HOMICIDE IN DEFENSE OF SON.—If one fires a fatal shot in defense of his son, he is excusable or not according as the son would be innocent or guilty had he fired the shot in his own defense. (pp. 335, 336.)

HOMICIDE—EVIDENCE.—If a homicide results in a controversy over the defendant's right to a road, evidence of facts on which this right is based is admissible to show his good faith and assist the jury in determining the punishment if he is guilty. (pp. 335, 336.)

Kennedy & Williamson, Turner & Hazerigg, and E. M. Dickson, for the appellant.

Robert B. Franklin, commonwealth's attorney, and W. S. Taylor, attorney general, for the appellee.

727 HOBSON, J. The appellant, Hezekiah Utterback, was indicted in the Bourbon circuit court for the murder of Dudley Clinkenbeard, and having been found guilty of manslaughter, and his punishment fixed at five years in the penitentiary, he seeks by this appeal a reversal of the judgment against him.

The first point made is that he was not arraigned, and did not waive arraignment. The facts about this are that after the jury were sworn and some testimony heard, it was remembered that the indictment had not been read, and no plea entered for the defendant. The commonwealth's attorney thereupon, by leave of the court, and in the presence of the defendant and his counsel, read the indictment to the jury, and after reading it, turned toward the defendant and his attorneys, and inquired what his plea was, to which one of the defendant's attorneys responded, "Not guilty"; and thereupon the examination of the witnesses was resumed, the attorneys consenting that the testimony that had been given should be considered without being reintroduced. The Criminal Code of Practice (sections 154 and 155) provides: "An arraignment is a reading of the indictment by the clerk to the defendant and asking him if he pleads guilty or not guilty to the indict-

ment. The arraignment shall only be made on indictments for felony, and may be dispensed with by the court with the defendant's consent." The reading of the indictment to the jury in the hearing of the defendant was a substantial compliance with the statute. His entering the plea of not guilty without objection, after the indictment was read by the commonwealth's attorney, [728] and agreeing through his counsel that the evidence already taken might be considered in, was a waiver of the irregularity in the proceedings of the court. In Galloway v. Commonwealth, 5 Ky. Law Rep. 213, where there was a somewhat similar irregularity, this court said: "In this case, though not done at the precise time required by the Criminal Code, the duty was performed before the close of the evidence for the commonwealth, while it was still in the power of the court to recall the witnesses, and give to the party desiring an opportunity to re-examine them. And, as no motion was made for the recall of the witnesses, we do not perceive how the substantial rights of the defendant were prejudiced by the omission now complained of. Nor is the mere fact that the indictment was read by an attorney employed to prosecute, instead of the clerk or commonwealth attorney, ground for reversal, having been done at the request of the latter officer, in the presence of the court and of the defendant, without objection made at the time."

In the case at bar the defendant testified in his own behalf, making no question of a want of arraignment until after the close of the trial. The case was fully heard, and we do not see that any substantial right of his was prejudiced in this matter. A judgment of conviction cannot be reversed in this court for every error of law occurring at the trial. Our jurisdiction in such cases is wholly dependent upon the statute, which provides: "A judgment of conviction shall be reversed for any error of law appearing on the record when upon consideration of the whole case the court is satisfied that the substantial rights of the defendant have been prejudiced thereby."

For an intelligent understanding of the other errors relied on, it will be necessary to state with some fullness [729] the facts which the evidence on the trial conduced to show. Appellant Utterback was a son in law of John Sharp. The deceased, Clinkenbeard, had married Sharp's granddaughter, and both lived near him. Utterback had bought his farm from Sharp, and had no outlet to the turnpike except over

Sharp's land. For many years he had used a road up the creek, but, for Sharp's convenience, he gave up that road, and took a road over the hill, and had used this road for some twenty years. Two or three years before the trial, a part of this road becoming bad, Utterback made a new track for about two hundred feet at one place in the road alongside of it, and only a few feet from it. To this there was at the time no objection, and he and the other neighbors used the road, including the turnout, at pleasure. Sharp rented to Dudley Clinkenbeard the land lying north of the road, and to William Utterback, the son of appellant Hezekiah, the land south of the road. On the morning of April 21, 1898, appellant passed over this road with some hogs, and found that Clinkenbeard was plowing out to the old road, and breaking up the new road, or turnout, only one furrow having been run in the new road. He went to see Clinkenbeard, protesting against his plowing up this road, and Clinkenbeard referred him to Sharp, saying he would do what Sharp said. Appellant then went to see Sharp, who said he was willing to give him one road, but not two, and finally agreed that he would have the old road plowed and put in order. Appellant went home to dinner, and after dinner armed himself with his rifle, and went out to the road, several more furrows having in this time been plowed in it. In the meantime, Clinkenbeard also went to see Sharp, evincing a disposition not to plow the road if he said so; but Sharp insisted upon his plowing it. Clinkenbeard then repaired [730] to a neighbor to borrow buckshot, stating that he had two cartridges that were good for fifty or sixty yards. After Sharp got his dinner, he went out to the road with a negro and team, for the purpose of harrowing the old road, and he and the negro went to work at this. At this time appellant Utterback had come up with his rifle, and sat down in the road, with his feet in the last furrow made in it, and his back to the unplowed land, his rifle resting across his lap. There is some controversy as to what occurred next, but as the jury may have believed appellant's version of it, and he was entitled to have them instructed on this hypothesis, it will be proper to consider the case from his standpoint. He stated that, while he was seated there in this position, some one hallooed, "Look out!" that at this time Clinkenbeard's team, driven by a negro, who was holding the plow, was coming up about thirty or forty yards behind him, and Clinkenbeard was walking beside the negro, with a double-barrel shotgun in his hand; that when

appellant looked around he saw Clinkenbeard with his gun up, in a shooting position, and, before appellant got straightened up, Clinkenbeard shot him in the right side; that he then raised his rifle, but before he could shoot, Clinkenbeard shot him the second time, causing the rifle to drop just as it went off, so that the ball struck Clinkenbeard in the leg. William Utterback, appellant's son, who rented the land on the other side of the road, had also come out with his team to plow that evening the land he had rented, and had brought a revolver in his pocket. From the disturbance of the teams, William Utterback was brought near Clinkenbeard. He had his revolver in his hand, while Clinkenbeard loaded his gun, but was making no demonstration or effort to use it. After appellant and Clinkenbeard had emptied [731] their guns, both retired a few steps, broke their guns and reloaded. As soon as Clinkenbeard reloaded his gun, he leveled it upon William Utterback, and fired both barrels at him, putting out one of his eyes, and inflicting other painful but not serious injuries. When appellant saw Clinkenbeard shooting at his son, he shot at him again, but too late to save his son, the ball, however, striking Clinkenbeard in the shoulder, and inflicting a mortal wound, from which he died shortly afterward.

On these facts, the court below, after instructing the jury on the right of self-defense, gave the following instruction, qualifying it: "But if the jury believe from the evidence that the deceased had rented of Jack Sharp the land lying north of the old road, and as shown by the plat in evidence before the jury, and that said Sharp had put deceased in possession thereof, the deceased had the right to plow all of said land, including the new road mentioned and described in the evidence; and if the jury shall further believe from the evidence that the defendant, Hezekiah Utterback, went upon said rented premises armed with a gun, with the intention of killing said Clinkenbeard, or of doing him great bodily harm in case deceased plowed up said road, then such entry upon said land by the defendant was unlawful and forcible, and said defendant was in fact and in law a felonious trespasser, and the deceased had the right to repel such forcible entry on his premises; and if he, the deceased, believed, and had reasonable grounds to believe, that he was in danger of losing his life or the infliction of great bodily harm at the hands of the defendant, he had the right to stand his ground and kill the defendant; and if the jury shall believe from the evidence that

by reason of a forcible entry, as aforesaid, by the defendant, a shooting took place between [732] the defendant and the said Clinkenbeard, and that the defendant in said shooting, did shoot and kill the said Clinkenbeard, then the defendant cannot claim the right to nor rely on the defense of self-defense, and the jury ought to so find; and the jury is further instructed that if they believe from the evidence that, by reason of a forcible entry aforesaid, the shooting between the defendant and the deceased took place, and that the son, William Utterback, being present, did draw his pistol, and the deceased believed, and had reasonable grounds to believe, that he was in danger of losing his life or the infliction of great bodily harm at the hands of said William Utterback, that the deceased had a right to shoot, and, if necessary, to kill, the said William Utterback; and if, in attempting to do so, the defendant, Hezekiah Utterback, shot and killed the deceased, then the defendant Hezekiah Utterback, cannot claim the right to nor rely on the defense of defending his son, William, and the jury ought to so find."

If Clinkenbeard had not died of his wounds, and had been on trial for shooting appellant when he was sitting down quietly, with his back to him, and unconscious of his approach at the time that Clinkenbeard raised his gun to shoot him, it would hardly be contended that Clinkenbeard would have been entitled to this instruction as the law of self-defense. If it could not be given in favor of Clinkenbeard if on trial, it should not have been given against appellant. The evidence for appellant conduced to show that Sharp had granted him the right to the road, and that he had long held possession of it, with Sharp's consent. If the instruction given was sound, then, on the same principle, appellant was entitled to an instruction that if Clinkenbeard came upon his road while he was in [733] possession of it, and made said entry armed with a gun, with the intention of killing him or doing him great bodily harm in case he did not allow the road plowed, then Clinkenbeard was a felonious trespasser, and the deceased had the right to repel such forcible entry on his premises, etc.

The facts show beyond doubt that Clinkenbeard and appellant each thought himself entitled to the disputed land, and each regarded the other as a trespasser. They could not settle this dispute by the arbitrament of arms. Life cannot be taken to prevent a trespass, and, on a trial for homicide, the guilt or innocence of the defendant does not depend upon

whether he was right or wrong in the controversy about the land. Life, in cases like this, can only be taken in self-defense or in the necessary defense of others. The instruction quoted seems to have been based upon the case of Baker v. Commonwealth, 93 Ky. 304, 19 S. W. 975. But in that case, the deceased and his party having undertaken to drive the accused from his own premises, he took refuge in his stable, and, as deceased approached, he called to him to stop. Deceased then started forward, grabbing a gun from one of his friends, and, as he advanced, was shot by appellant. The purpose of the attack was to kill accused or run him off. On these facts the court only held that the accused was not bound to retreat, but might take such steps as he had reasonable grounds to believe necessary to protect his life or prevent great bodily harm at the hands of his assailant.

In Estep v. Commonwealth, 86 Ky. 39, 9 Am. St. Rep. 260, 4 S. W. 820, where the deceased was a trespasser in the accused's dwelling-house, and the wife of the accused had been assailed, and was being beaten on the floor, this court went [734] no further than to say that the accused had a right to stand his ground, and take such steps as were apparently necessary to protect himself and his family from the then impending danger. The same principles were announced in Eversole v. Commonwealth, 95 Ky. 623, 26 S. W. 816. In 1 Wharton on Criminal Law, section 500, this is said: "We may here repeat that it is murder for A to deliberately kill B for merely trespassing on A's property, A at the time knowing that only a trespass was intended. The same rule applies mutatis mutandis to the vindication of the right to personal property. If the killing of the trespasser in either case take place in the passion and heat of blood, the killing is manslaughter; but unless it be in resisting robbery, it is not justifiable. The reason is that, in the given cases of trespasses, the killing was unnecessary, the party killing knowing that only a trespass, or, at the most, a trivial larceny, was intended."

In 1 Bishop on Criminal Law, sections 857, 858, the law is thus stated: "The general doctrine is that while a man may use 'all reasonable and necessary force to defend his real or personal estate, of which he is in the actual possession, against another who comes to dispossess him without right,' he cannot innocently carry this defense to the extent of killing the aggressor. If no other way is open, he must yield and get himself righted by resort to law. But the general doctrine

as to the defense of property is not applicable to the defense of what is termed the 'castle.' In the early times our forefathers were compelled to protect themselves in their habitation by converting them into holds of defense; and so the dwelling-house was called a 'castle.' And thence has grown up the familiar doctrine that, while a man keeps the doors of his house closed, no other has the right to [735] break in under any circumstances, except in particular cases, where it becomes lawful for the purpose of making an arrest of the occupant, or the like—cases which it is not within our present line of discussion to consider. From this doctrine is derived another —namely, that the person within the house may exercise all needful force to keep the aggressor out, even to the taking of life."

In the case at bar the difficulty occurred over a little strip of land remote from the dwelling-house of either party, and neither could legally vindicate his rights as he conceived them to be by a breach of the peace, much less by the taking of human life. The question as to who was in the right about the land is not to be determined here, for neither party had the right to resort to firearms, unless life was then and there in danger or great bodily harm apprehended. The right of the parties to the land can only be tried in a civil suit between them. The evidence to their respective claims is only admissible in this case to put the jury in the situation of the parties, so that the jurors may better judge as to their motives, and determine, where the evidence is conflicting, more intelligently as to their actions.

We see no error in the other instructions of the court, except that on another trial it will be better to modify No. 1 so as to read, "Not in the necessary or apparently necessary defense of himself or his son, William Utterback," in the place of the words "Not in his necessary self-defense," at present in the instruction.

There was evidence by the commonwealth tending to show that appellant and Clinkenbeard both began shooting simultaneously when Clinkenbeard appeared, and without either waiting for a demonstration by the other.

On this phase of the case, the court should instruct the [736] jury that if appellant commenced the difficulty by making the first demonstration to shoot, or if both appellant and deceased went on the premises armed, determined on a conflict, and, on meeting, the conflict was by mutual consent, then, in

either event, appellant could not rely on the right of self-defense, unless he in good faith withdrew from the conflict, and only re-engaged in it afterward in defense of his son; and if he so fired the fatal shot in defense of his son, he is excusable or not, according as the son would be innocent or guilty had he then fired this shot himself in his own defense.

This instruction should be substituted for that quoted on a retrial of the case. The evidence offered by the appellant to show his right to the road in the bottom, and how and on what terms that was exchanged for the road on the hill, why the new road or turnout was made, how long it had been used, and the character of its use, and that Sharp consented to this use of the new road, should have been allowed to go to the jury. It served to show the good faith of the defendant, and, as the punishment is largely in the discretion of the jury, they should be placed, as far as possible, in the situation of the parties. The minutiae of the evidence on these points need not be stated, but only the general facts.

In the exclusion of this evidence, and the giving of the instruction referred to, the substantial rights of the appellant were prejudiced. The proof shows that he was a quiet, peaceable man, of good character, and that the deceased was a dangerous and violent man, who was by no means a novice in such encounters. The instruction quoted would be understood by an ordinary jury as equivalent to a peremptory instruction to find the defendant guilty. From the verdict which the jury returned, [737] it would seem that they believed appellant's version of the affair, and if so, the rejected evidence might have been of great value in their minds on several of the disputed questions in the case.

The judgment of the court below is therefore reversed, and the cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

The Law of Self-defense as applied to the protection of habitation is discussed in the recent cases of Palmer v. State, 9 Wyo. 40, 87 Am. St. Rep. 910, 59 Pac. 793; Elder v. State, 69 Ark. 648, 86 Am. St. Rep. 220, 65 S. W. 938. Life cannot be taken to prevent a mere trespass on property: See the monographic note to State v. Sumner, 74 Am. St. Rep. 737-740. One who intervenes in a difficulty, in behalf of his brother and takes the life of the other combatant, stands in the shoes of the brother in respect to bringing on the difficulty, and cannot defend on the ground of his brother's peril unless the latter could so defend: Wood v. State, 128 Ala. 27, 86 Am. St. Rep. 71, 29 South. 557. See, also, the extended note to State v. Sumner, 74 Am. St. Rep. 735-737.

DICKEY v. DICKINSON.

[105 Ky. 748, 49 S. W. 761.]

THE STATUTE OF FRAUDS REFERS TO A CONTRACT which, by its terms, is not to be performed within a year, and which, from its very stipulations, is not capable of being performed within a year. (p. 338.)

STATUTE OF FRAUDS.—A CONTRACT NOT TO AGAIN ENGAGE IN PUBLISHING a newspaper in a given place is not within the statute of frauds. (p. 338.)

Boles & Duff and William H. Holt, for the appellant.

W. L. Porter, for the appellee.

749 HAZELRIGG, C. J. The appellant Dickey, plaintiff below, filed his petition and amended petition in the Barren circuit court, alleging that on the sixth day of January, 1897, he purchased from the appellee Dickinson his one-third interest in a certain newspaper (the "Glasgow Times") then being published in the town of Glasgow, and paid therefor the price of two thousand two hundred and fifty dollars, cash; that, as a part of the consideration entering into the contract, the appellee Dickinson obligated himself to the appellant not to again engage in the newspaper business in the town of Glasgow. Appellant further alleged that he immediately took possession of the one-third interest purchased, and, in connection with others, continued to publish the "Glasgow Times," and was so publishing the same at the time of the institution of this action; but that the appellee Dickinson, in violation of his contract, had engaged himself with others in publishing another newspaper in Glasgow, known as the "Glasgow Semi-weekly News," which 750 paper appellee and others had been publishing regularly twice a week since the sixteenth day of March, 1897. The appellant further says that, on account of the violation of the alleged contract by Dickinson in publishing the semi-weekly, the receipts of the "Glasgow Times" have been reduced, the profits lessened, the expenses increased, and his business to a certain extent impaired, to his damage in the sum of twelve hundred and fifty dollars, for which amount he asked judgment.

On demurrer the petition was dismissed. The correctness of that judgment depends on the question whether this contract, admitted to be verbal, comes within our statute of frauds, which prohibits one from being charged on account of a con-

tract "not to be performed within a year," unless the same be in writing, or there be some memorandum signed by the party to be charged therewith.

We cannot agree with counsel for appellant that the statute can have no application to contracts of this character. A contract to refrain from doing a thing may be one not to be performed within a year, and is capable of being embraced within the terms of the statute. Thus, it would seem that if A, in 1896, agreed with B that he would not publish a newspaper published in the town of C during the presidential year of 1900, the contract would be within the statute. There the stipulation of the contract leaves no uncertainty as to the time of its performance—that is, the time of the act of refraining; and this time is expressly postponed beyond a year from the making of the contract. In such case, the contract is capable of being performed only beyond the year. The death within a year of the party contracting to refrain might render the contract a dead letter, and its performance impossible. Still, the statute looks to the performance, and not to the defeat, of the contract, and the death cannot be said to be a [751] contingency upon the happening of which the contract becomes executed. The law refers to a contract which, by its terms, is not to be performed within a year, and which, from its very stipulations, is not capable of being performed within a year. But if A agree to pay B certain money when B marries, the agreement is not within the statute, because the time of performance is not fixed in the contract at a period beyond a year. So a contract to provide for one during his life is not within the statute for the same reason. In these illustrations there is nothing in the contract precluding their performance within a year by fixing the time of performance beyond a year. A contract not to again engage in publishing a newspaper in a given place is a personal contract not to do so during the life of the party so contracting; and if his death ensue without his having done so, the contract is fully performed. Such a contract does not fix in terms a time certain for its performance, and hence it cannot be said that it fixes the time for performance beyond a year. The time is left open by the parties, and if death may fulfill it or effect its performance within a year, the contract is not within the statute.

Discussing a similar question, this court, in the case of Stowers v. Hollis, 83 Ky. 548, said: "If the performance of a contract depends upon a contingency which may happen within a

year, then it is not within the statute, although that contingency may not in fact happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. It is sufficient if the possibility of performance existed." There the court held that notwithstanding the fact that the contract to support a child was verbal, and was to cover an indefinite number of years, still the contract might [752] have been completed and fulfilled by the death of the child within a year from the time of the making of the contract.

The case of Blanchard v. Weeks, 34 Vt. 589, was a case where a physician, for a certain consideration, verbally agreed that he would refrain forever from the practice of medicine and surgery in a certain vicinity, while another of his own profession, who had paid the consideration, should reside and practice medicine and surgery in the named vicinity. In discussing the question as to whether such contract was within the statute of frauds, the court there said: "This stipulation in its character is strictly personal, to be performed by the defendant himself, and one which can never become binding upon his representatives or any other person. It is not to be performed by any active agency of the defendant, but only requires a passive acquiescence in its provisions. It is binding upon the defendant while he lives; but at his death all obligation terminates, the end sought to be attained by it is fully accomplished, and the contract is then performed. Although the expressions are that the defendant will refrain from the act forever, it is but saying that he will not do the act, the obligation of which ceases at his death. It is a contract, therefore, to be performed during the life of the defendant, and, if not violated during his lifetime, is fully performed at his death."

And so, in the case of Lyon v. King, 11 Met. 411, 45 Am. Dec. 219, the court held that an oral agreement "not to hereafter engage in the stable or livery business in S.," is not within the statute of frauds. The court there said: "In the case at bar the contract might have been wholly performed within a year. It was a personal engagement to forbear doing certain acts. It stipulated nothing beyond the defendant's [753] life. It imposed no duties upon his legal representatives, as might have been under the contract to perform certain positive duties. The mere fact of abstaining from pursuing the staging and livery-stable business, and the happening of his death, during

the year, would be a full performance of this contract. Any stipulations in the contract looking beyond the year depended entirely upon the contingency of the defendant's life; and, this being so, the case falls within the class of causes in which it has been held that the statute does not apply."

The cases along this line are numerous, and there are none to the contrary. It will be found upon examination that the statutes of frauds in the states of Vermont and Massachusetts, as discussed in the decisions heretofore cited, are quite similar to our own statute of frauds.

It is insisted by counsel for appellee in the case at bar that the contract under consideration is not like a contract to do a thing that might be accomplished in a year, but that it is a contract not to do a certain thing at all, in a certain place. The contract, as alleged, could not be performed within a year. The decisions above quoted meet this question fully, holding that it was possible that the contract could have been performed and fulfilled within a year by the death of the obligor.

The obligation of the appellee is not one that survives. The obligation determines and is fulfilled upon the death of the obligor; and while it may not be at all probable that this contingency—the death of the obligor within a year—would happen, yet it is clearly possible of performance.

The judgment is reversed for proceedings consistent herewith.

The Statute of Frauds applies if the time from the making of an agreement to the end of its performance exceeds a year never so little: Wickson v. Monarch Cycle Mfg. Co., 128 Cal. 156, 79 Am. St. Rep. 36, 60 Pac. 764; but not if the contract may be terminated or performed within a year, though it is made for an indefinite period: Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; Sax v. Detroit etc. Ry. Co., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; Warren etc. Co. v. Holbrook, 118 N. Y. 586, 16 Am. St. Rep. 788, 23 N. E. 908. If a person carrying on a business agrees to abandon it and enter the services of another, who agrees to furnish the former permanent employment at stipulated wages, the contract is not within the statute, because it can be completely performed within a year: Carnig v. Carr. 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117.

FARMERS' BANK OF VINE GROVE v. SMITH.

[105 Ky. 816, 49 S. W. 810.]

CORPORATION'S LIABILITY FOR SERVICES OF PROMOTER.—A corporation is liable, by an implied contract, for such services rendered for the use of the corporation as are necessary to its formation, or may be necessary to be done by it, after its incorporation, in furtherance of its corporate business. (p. 342.)

D. C. Haycraft and J. C. Hobson, for the appellant.

Marriott & Faurest, for the appellee.

[817] WHITE, J. The appellee by this action sought to recover of appellant the sum of five hundred dollars for services rendered in organizing the bank, securing and soliciting stock, superintending the work of building, writing the articles of corporation, and various services before, and some after, the date it commenced business. The answer is a denial of any contract, either expressed or implied, or any liability to pay, a denial [818] of the value, and an allegation that the services were rendered gratuitously by appellee. The case was tried before a jury, and resulted in a verdict and judgment for appellee in the sum of three hundred and fifty dollars. After reasons and motion for new trial had been overruled this appeal is prosecuted. The reasons for a new trial are: The error of the court in refusing to give a peremptory instruction; permitting incompetent evidence to go to the jury, over its objection; error in giving instructions 1 to 7, inclusive, and in refusing others (1 to 4) asked for; error in modifying instruction 7, and in refusing to give same as asked; that the verdict is flagrantly against the evidence; that the pleadings do not warrant the judgment.

From the proof introduced as to the amount and value of the services rendered, there can scarcely be a question as to the amount found by the jury, if, as a matter of law, appellee has shown himself entitled to recover any sum. Appellee actively, and almost exclusively, secured all the stock to be taken. He made trips to Hodgenville, Louisville, and Frankfort in the interest of the corporation, superintended the construction of the banking-house, let out contracts, negotiated the purchase of the lot on which was erected the banking-house, drew the articles of incorporation, and, after the bank began work, gave its officers such advice as they sought. The verdict of three hundred and fifty dollars is not unreasonable.

The question of gratuity was submitted to the jury on conflicting evidence, and it cannot be said their verdict is flagrantly against the evidence, and unless it be so, it will not be disturbed. It is earnestly contended that appellee cannot recover any sum for this service, although it was rendered, and was beneficial and accepted by the appellant, for the reason that he had no contract, [819] and because there was no corporation to make a contract with, and any agreement made by any person before the organization would not bind the corporation, for the reason that it was ultra vires as to the corporation. We do not assent to this doctrine. We are of opinion that a corporation is, by an implied contract, liable for such or any services rendered for the use of the corporation as are necessary to its formation, or may be necessary to be done by it, after its incorporation, in furtherance of its corporate business.

The case of Low v. Connecticut etc. R. R. Co., 45 N. H. 370, is directly in point, and has been approved by this court. It says (page 377): "It may, then, be safely assumed that under the laws of Vermont the corporation is liable in some form for services necessary to perfect its organization, and which, when such organization was perfected, it accepted, and enjoyed the benefits arising therefrom. Such would be the case in respect to services in obtaining subscriptions to the capital stock, rendered by a corporator or associate, and which subscriptions were, after the organization, accepted by the corporation. Of course, to entitle the plaintiff to recover, such services must have been necessary and reasonable, and rendered, not gratuitously, but with the understanding and expectation that they were to be paid for." This case, supra, was expressly approved by the supreme court of Pennsylvania (Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54, 21 Am. Rep. 39), the court holding: "It may very well be that, where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number with an understanding that compensation shall be made [820] therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefit thereof enjoyed by them, they must take such benefits cum onere, and make compensation therefor." This principle was recognized

in the case of Waddy Blue Grass Creamery Co. v. Davis-Rankin Bldg. etc. Co., 103 Ky. 579, 45 S. W. 895, as well as Morton v. Hamilton College, 100 Ky. 281, 38 S. W. 1.

It seems to us that any other rule would render it difficult to organize any corporation, however necessary. No person would render the services, or pay another to do so, however essential it be to the organization, if there was no obligation to pay by the corporation after it is brought into existence. We are of opinion that appellee was entitled to recover for the services rendered and sued for, as they were necessary to the organization of the corporation.

We are referred to the case of Oldham v. Mt. Sterling Improvement Co., 103 Ky. 529, 45 S. W. 779, as holding that the corporation cannot be made liable by the representations or acts of its promoters. The question in that case was the right of a subscriber for stock to defeat the collection of his unpaid subscription of stock by reason of false and fraudulent representations of a promoter as to the condition and prospects of the company. The court holds that the corporation is not bound by such representations, and a stockholder cannot be relieved by reason thereof. Any other expression was but dictum. This case is clearly distinguishable from the Oldham case, supra. The charges here made are for necessaries for the organization of the corporation.

Appellant complains of the ruling of the court in admitting 821 certain testimony of Young. The effect of this testimony is that witness was a stockholder and a preliminary director, and that he had no knowledge or information of any contract or agreement to pay appellee for his services, but that the witness expected such would be paid, as that was customary in organizing corporations.

We do not think that the admission of this evidence is such error, if any, as alone would authorize a reversal. The instructions given the jury clearly state the law of the case, and are approved. Finding no error, the judgment is affirmed, with damages.

Promoters of Corporations and their relations thereto are discussed in the monographic note to Pittsburg Min. Co. v. Spooner, 17 Am. St. Rep. 161-168. It has been held that there is no implied promise imputed to a corporation to pay for the services of a corporator or promoter before it comes into existence: Weatherford etc. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795; and that he cannot recover therefor in the absence of proof that a majority of the corporators or promoters authorized the service: Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54, 21 Am. Rep. 39.

DUNN v. COMMONWEALTH.

[105 Ky. 834, 49 S. W. 813.]

PROSTITUTES.—A MUNICIPAL ORDINANCE PROHIBITING PROSTITUTES from being on the streets between 7 o'clock P. M. and 4 o'clock A. M. following, except in instances of reasonable necessity, to be shown by the party charged, is a valid exercise of the police power. (p. 347.)

Dinkle & Montague, for the appellants.

J. A. Burns, for the appellee.

835 PAYNTER, J. Section 3490 of the Kentucky Statutes is part of the act for the government of cities of the fourth class, and as much of it as is pertinent to this inquiry reads as follows: "The board of council shall have power within the city: 1. To pass ordinances not in conflict with the constitution or laws of this state or of the United States. 14. To restrain and punish vagrants, prostitutes, rakes, and whoremongers." Conceiving it had the power, the board of council of the city of Catlettsburg passed an ordinance which reads as follows (section 24): "Any prostitute being upon the streets or alleys of the city of Catlettsburg, Kentucky, between the hours of 7 o'clock P. M. and 4 o'clock A. M. following, standard time, except in instances of reasonable necessity, to be clearly shown by the party charged, shall be fined five dollars for each offense."

The appellants are prostitutes, and went upon the streets between the hours of 7 o'clock P. M. and 4 o'clock A. M., without any reasonable necessity therefor. For this offense a warrant was issued for their arrest, and the trial resulted in their conviction, and a fine of five dollars was assessed against each of them. The circuit court sustained the action of the police judge imposing the fine. The question for review is whether the ordinance in question is valid.

A municipality is but an agency of the state, and whenever it passes an ordinance in the exercise of police power, it is the instrumentality of the state, and does so for the state. The general assembly has vested the board of 836 council of the municipality of Catlettsburg with power to "restrain and punish prostitutes." The language used is broad and comprehensive enough to authorize the enactment of the ordinance under consideration. Did the general assembly have constitutional

authority to vest the board of council with the power to enact the ordinance? Under our constitutional system, the ordinary police regulations have been left to the states. All that the federal government can do is to see that the states do not, in attempting to exercise the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has vested in the national government, or deprive a citizen of rights guaranteed to him by the federal constitution. It is difficult to define the police power of a state.

In speaking of the police power of the states, Mr. Cooley, in his work on Constitutional Limitations (page 704), says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Blackstone defines it to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations": 4 Blackstone's Commentaries, 162.

337 In speaking of the difficulty in defining the extent of police power, in Stone v. Mississippi, 101 U. S. 814, it was said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate."

Courts and law-writers have found it difficult to define the extent and boundaries of the police power. It certainly extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty, and enjoyment of his property; and they cannot be taken from him, except by due process of law. Social and conventional rights, however, are subject to such reasonable limita-

tions in their enjoyment as will prevent them from being dangerous and hurtful to the body politic; and the law-making department of the government, under the power vested in it by the constitution, can enact laws providing for such reasonable restraints and regulations as may be necessary and expedient to secure social order and public morals. It is the duty of the state, direct or through such agencies as it may provide, to protect the public health and morals. It has the power by law to declare what shall constitute an offense, and provide a punishment for it within the constitutional limitations. It is certainly within the legislative power to provide for the restriction or suppression of bawdy-houses. Our social institutions and public conscience demand that they shall be regulated or suppressed. The unfortunate beings who live in such houses and pursue their occupation live from their acts of immorality, which are [888] a violation of social order, and tend to the destruction of public morals. The board of council of a municipality is presumably familiar with their habits and method in the prosecution of their work of shame and degradation. It was known to the board of council that these unfortunate women did nothing for a livelihood except to make merchandise of themselves. The favorite time for their business is between nightfall and the next day's dawn. Their conduct is calculated to bring together disorderly and ill-disposed persons, and likely to result in a breach of the public peace. Therefore the law-making department of the municipality declared that they should keep off of the streets and alleys of the city during the hours in which they could most successfully prosecute their immoral work.

We think this is a reasonable restraint, and it does not unreasonably abridge their personal liberty. By the terms of the ordinance, they are allowed to go upon the streets if there is a reasonable necessity for it. During the fifteen hours of the twenty-four, these habitual offenders against the moral, social, and penal laws are permitted to go wherever they please upon the streets and alleys of the city, which affords them ample opportunity for healthful exercise, and of attending to their reasonable wants.

Mr. Cooley, in his work on Constitutional Limitations (page 745), says: "It is sufficient for us to have pointed out that, in addition to the power to punish misdemeanors and felonies, the state has also the authority to make extensive and varied regulations as to the time, mode, and circumstances in and

under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established [839] for the protection of private rights or private property."

It has been held by courts that, under the police power, municipalities can regulate the height of buildings in cities, prescribe the streets upon which persons driving a certain class of vehicles shall travel, and prohibit them from traveling upon the streets, and regulate the hours at which public places, places of amusement, and saloons shall be closed. The legislatures of the states can enact laws to regulate the employment of children of certain ages, and prohibit women from engaging in certain kinds of employment. It has been held by some courts that a penalty can be imposed upon livery-stable keepers for giving credit to pupils without the consent of the college authorities. It has been held, to protect laborers against oppression of their employers, that it is competent to forbid them being paid anything except legal tender funds.

Many illustrations of the exercise of police power which have been sustained by the courts of the country could be given.

These suggestions are merely to show the extent and comprehensiveness of the police powers of the states, as interpreted by this and other courts of the country.

Our attention has not been called to any case involving the exact question involved in this case. As cases arise in which the police power is attempted to be exercised, we must determine whether or not it has been constitutionally done. Our conclusion is that the legislature vested the board of council with the power to pass the ordinance, and that in doing so it did not violate the constitution of this state or of the United States.

When the court had under consideration the case of [840] Meader Furniture Co. v. City of Newport, 16 Ky. Law Rep. 829, 30 S. W. 207, its attention was not called to section 3519 of the Kentucky Statutes, which expressly gives this court jurisdiction of appeals from the judgments of circuit courts where fines of twenty dollars or less are imposed under ordinances the validity of which is questioned. If the court's attention had been called to this section of the statute, it would not have taken the view of the question of the appellant's right to an appeal which it took.

The judgment is affirmed.

A City Ordinance Prohibiting Disreputable Women from standing or loitering about the streets or stores at night, unless on unavoidable business, is valid: Braddy v. Milledgeville, 74 Ga. 516, 58 Am. Rep. 443. But a penal ordinance forbidding lewd women to reside or stay in a city, and forbidding the renting of premises to them, is void: Milliken v. City Council, 54 Tex. 388, 38 Am. Rep. 629. See, in this connection, Paralee v. Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. 654; Ex parte Smith, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628; monographic note to Booth v. People, 78 Am. St. Rep. 271-274.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BUTMAN v. CITY OF NEWTON.

[179 Mass. 1, 60 N. E. 401.]

MUNICIPAL CORPORATIONS—PUBLIC STREETS—NEGLIGENCE IN REPAIRING.—If a town, in place of leaving the repair of its ways to the public officers designated by statute, undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence. (p. 350.)

MUNICIPAL CORPORATIONS—PUBLIC STREETS—NEGLIGENCE IN CONSTRUCTING.—If a city, in place of leaving its ways to be constructed in accordance with the statutes, leaves their construction to its own superintendent of streets, acting under the direction of a joint committee of its aldermen and common council, it makes the superintendent its agent, and is liable for the negligence of workmen acting under him. (pp. 350, 352.)

MUNICIPAL CORPORATIONS—PUBLIC STREETS—NOTICE OF UNSAFE CONDITION.—When a street is being constructed, one who drives thereon between wooden horses bearing the sign, "No passing through," which have been placed across the way or are temporarily standing lengthwise at the side of the road in such a position as plainly to indicate that it is not open to travel, does so at his own risk. (p. 354.)

NEGLIGENCE—PUBLIC STREETS.—IT MAY BE NEGLIGENCE FOR WORKMEN constructing a street to dump a load of stone on the platform of a stone-crusher and let off steam just as a horse, which is being driven along a roadway twenty-five feet away in plain sight, is opposite. (p. 354.)

W. S. Slocum, for the defendant.

G. L. Mayberry, for the plaintiff.

[S] LORING, J. In this case, the plaintiff's horse was frightened by some person or persons dumping a load of stone upon the wooden platform of a stone-crusher, "the noise from which, together with escaping steam, frightened the plaintiff's horse

and he ran away," and caused the injury sued for. The employés who dumped the stone, and who had charge of the steam-engine by which the stone-crusher was run, were acting under the superintendent of streets, and were engaged in constructing Commonwealth avenue.

1. The defendant's first contention is that the act complained of is that of a public officer for which the city is not liable.

It is established on the one hand that a town is not liable for injuries caused to a person by the negligence of those engaged in repairing a way within its boundaries, if the work is done by or under a surveyor of highways: Walcott v. Swampscott, 1 Allen, 101; Hennessey v. New Bedford, 153 Mass. 260, 26 N. E. 999; or by a road commissioner: McManus v. Weston, 164 Mass. 263, 41 N. E. 301. And on the other hand, it is also established that if a town, in place of leaving the repair of its ways to the surveyor of highways or to road commissioners, who are the public officers designated by the statutes to see that the highways are kept in a safe condition (Pub. Stats., c. 52, sec. 3; Nealley v. Bradford, 145 Mass. 561, 563, 564, 14 N. E. 652; Pratt v. Weymouth, 147 Mass. 245, 255, 9 Am. St. Rep. 691, 17 N. E. 538; Blanchard v. Ayer, 148 Mass. 174, 176, 19 N. E. 209), undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence: Hawkes v. Inhabitants of Charlemont, 107 Mass. 414; Deane v. Randolph, 132 Mass. 475; Tindley v. Salem, 137 Mass. 171, 172, 173, 50 Am. Rep. 289; Pratt v. Weymouth, 147 Mass. 245, 254, 9 Am. St. Rep. 691, 17 N. E. 538; Brookfield v. Reed, 152 Mass. 568, 26 N. E. 138; Collins v. Greenfield, 172 Mass. 78, 81, 51 N. E. 454.

The foundation of the general rule is, that the duty of repairing the public highways is the performance of a public duty imposed upon all towns alike, from the performance of which a town derives no special advantage in its corporate capacity. The exemption of the town, in those cases where it is exempt under the general rule, does not rest upon the fact that the town has no control over the highway surveyor or the road commissioner; the rule applies in many cases where the town has full control over the officials in question; for example, it has been held to include the case of an injury caused by the negligence of firemen in hauling a hose-reel to extinguish a fire, where the fire department in question was established by the town under a special act in place of leaving the mat-

ter to fire wards, and where the statute gave to the engineer and other officers of the fire department of the town the authority and duties of fire wards: Hafford v. New Bedford, 16 Gray, 297; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196. And see Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Howard v. Worcester, 153 Mass. 426, 25 Am. St. Rep. 651, 27 N. E. 11; Sampson v. Boston, 161 Mass. 288, 37 N. E. 177, 6 Am. Rep. 196; Pettingell v. Chelsea, 161 Mass. 368, 37 N. E. 380. The general rule, as we have said, includes all cases where the town is performing a public duty, imposed upon all towns alike, from the performance of which it derives no special advantage in its corporate capacity.

A town which undertakes to make repairs on ways within its limits, by its own agents, is an exception to the general rule. In that case it has a pecuniary interest in the matter by reason of its statutory liability for a defect in the way; this distinction is pointed out and the whole subject is so exhaustively stated by Allen, J., in Tindley v. Salem, 137 Mass. 171-173, 50 Am. Rep. 289, that it is not necessary to restate the reasons at length in this case. It may be added, however, to what was said there, that while a town has, by statute, a remedy over against the surveyor of highways, through whose fault or neglect the way came to be in a defective condition, in a case where it has been fined for allowing a way to be out of repair (see Pub. Stats., c. 27, sec. 128), it has no remedy over to recover the amount of a judgment against it for injuries suffered by a traveler from a defect in the way caused by the negligence of the surveyor: White v. Phillipston, 10 Met. 108.

It appears from the report in the case at bar that Commonwealth avenue, including that part of it on which the plaintiff was driving when the accident complained of occurred, was laid out by the city of Newton. We assume, therefore, that it was a town way, and was laid out under section 24 of the charter of the defendant city: Stats. 1873, c. 326. The laying out of a public way is the performance of a public duty imposed upon all towns and cities alike, from the performance of which they derive no special advantage in their corporate capacity, and is not the institution by the city of work for its own particular use and benefit. The defendant city, therefore, is not liable in this case, because it had directed work to be done for its benefit, in which case it might be under some

circumstances liable for injury caused by negligence in carrying it into effect.

The expense of constructing a town way is, by the provision of our laws, to be borne by the town in which it is laid out: Pub. Stats., c. 52, sec. 1; Pub. Stats., c. 49, secs. 68, 75. The act of the defendant city in making due appropriations for the construction of the way did not make it liable for this accident; that act also is the performance of a public duty within the rule.

The making of public ways is not only committed to the surveyors of highways or road commissioners, as is the matter of repairing them, but both matters are covered by one and the same sections of the Public Statutes: See Pub. Stats., c. 52, secs. 3, 13. Where a city or town pursues the course thus provided for, it is not liable for injuries caused by the negligence of those engaged in constructing a way: Taggart v. Fall River, 170 Mass. 325, 49 N. E. 622. This rule was applied in Jensen v. Waltham, 166 Mass. 344, 44 N. E. 339, where a street was being constructed by a board of street commissioners, the existence of which was provided for [8] in the charter of the defendant city (Stats. 1884, c. 309, sec. 23), and who were invested by an ordinance of the city with the duty of highway surveyors: See McCann v. Waltham, 163 Mass. 344, 345, 40 N. E. 20.

In the case at bar the city of Newton did not pursue the course set forth in the general laws for making the highways within its limits, but, on the contrary, it provided by its ordinances that "under direction of the joint standing committee on highways, the superintendent of streets shall have supervision of the making, widening, and altering of streets and ways": Newton Rev. Ord. 1894, c. 11, sec. 3. A "joint standing committee" is a committee of the city council, made up of the common council and the board of aldermen: See the charter of the defendant city, Stats. 1882, c. 210, sec. 2, amending Stats. 1873, c. 326, sec. 2. In other words, the defendant city, in place of leaving the ways within its limits to be constructed in accordance with the provisions of the Published Statutes, chapter 52, section 3, has preferred, having regard to its liability to travelers for defects in the way, to leave the construction of them to its own superintendent of streets, acting under the direction of the joint committee of its aldermen and common council. That makes the superintendent of streets the agent of the defendant

city in this connection, and the case falls within Hawks v. Charlemont, 107 Mass. 414; Deane v. Randolph, 132 Mass. 475; Tindley v. Salem, 137 Mass. 171-173, 50 Am. Rep. 289; Pratt v. Weymouth, 147 Mass. 245, 254, 9 Am. St. Rep. 691, 17 N. E. 538; Brookfield v. Reed, 152 Mass. 568, 26 N. E. 138; Collins v. Greenfield, 172 Mass. 78, 81, 51 N. E. 454, cited above.

The defendant relies on the case of Barney v. Lowell, 98 Mass. 570. In that case, the injury complained of was caused by the negligence of the driver of a cart in which stone was being hauled from a stone-crusher for the purpose of macadamizing a street, which was being repaired by the superintendent of streets. It appeared in the report in that case that the ordinances of the defendant city provided for the appointment of a superintendent of streets, who should have charge of the repairs of streets "under the direction of the highway surveyors or joint committee on streets." It also appeared that the repairs were being made "under the direction of the committee on streets of the board of aldermen." But a provision [9] in an ordinance that the surveyor of highways should act under the direction of the mayor and aldermen does not make him the agent of the city (Prince v. Lynn, 149 Mass. 193, 21 N. E. 296), and it seems to have been assumed that the superintendent of streets in that case was in fact acting "under the direction of the highway surveyors," as it was provided in the ordinance of the defendant city he might do, and not under the direction "of the joint committee on streets," which it is also provided in that ordinance could be done.

2. The defendant's second contention is that the plaintiff was driving on Commonwealth avenue at his peril, within the rule laid down in Jones v. Collins, 177 Mass. 444, 59 N. E. 64. But the evidence on this point was conflicting. On the one hand, there was testimony that "Commonwealth avenue was laid out with two roadways and a reserved space between the roadways"; also that at the time of the accident "this part of the road" on which the plaintiff was driving "was open to travel." On the other hand, there was evidence that "there were piles of stone and material about, machines for construction, men, horses and carts, and other evidence that the road was being constructed"; that "at the points of entrance of various streets to Commonwealth avenue as constructed wooden horses had been placed, upon which

were signs stating "No passing through'"; that "at the time of the accident some of these signs had been placed at the side of the road lengthwise, so as not to obstruct travel, and some were in adjoining fields but were plainly visible." We are unable to determine from these conflicting statements what the situation really was as to the part of the road on which the plaintiff was driving. If one of the two roadways had been thrown "open to travel" and the plaintiff was driving on it, he was there by right, and the defendant is liable for its negligence, if it was negligent in operating the stone-crusher. On the other hand, if the plaintiff drove onto a roadway between wooden horses which had been placed across the way, and on which were signs stating "No passing through," or even if he drove onto a roadway on which such signs had been placed and which were temporarily standing at the side of the road lengthwise in such a position as plainly to indicate that it was not open for travel, he went at his own risk. The [10] only exception covering this point is that to the refusal to order a verdict for the defendant. As there was evidence on which the jury, under proper instructions, could have found for the plaintiff, this exception is not well taken.

3. The defendant's third contention is that there was no evidence of negligence on the part of the defendant. But we think it might be found to be an act of negligence to dump a load of stone on the wooden platform of a stone-crusher and let off steam just as a horse which is being driven along a roadway only twenty-five feet away is opposite to it, and which is "in plain sight of the men who dumped the stone." The case does not come within the cases relied on by the defendant (Howard v. Union Freight R. R. Co., 156 Mass. 159, 30 N. E. 479, and Lamb v. Old Colony R. R. Co., 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932), where horses have been frightened by the escape of steam incident to the prudent running of its trains by a steam railroad which has been given the right to operate its road adjoining a highway.

In accordance with the terms of the report, there must be judgment for the plaintiff.

The Liability of a City for the Negligence of its officers and agents is considered in the monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 376-413. Municipal corporations are liable for injury to private rights or persons, resulting from negligence in the performance of a public duty, by their agents or servants, under their direction and control: Rhobidas v. Concord, 70 N. H. 90, 85 Am. St. Rep. 604, 47 Atl. 82.

GRAVES v. JOHNSON.

[179 Mass. 53, 60 N. E. 383.]

A SALE OTHERWISE LAWFUL is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. (p. 355.)

SALE OF LIQUOR FOR UNLAWFUL RESALE IN ANOTHER STATE.—A seller of liquors who rightly supposes that the buyer intends to resell them unlawfully without the state, but who is, and is known by the buyer to be, indifferent to what he does with the goods, and to have no other purpose than to sell them in the state in the usual course of business, may recover the price of the liquors. (pp. 355, 356.)

C. J. Martell, for the defendant.

A. Hemenway and J. Noble, Jr., for the plaintiffs.

[57] HOLMES, C. J. This is the second time that this case comes before this court: Graves v. Johnson, 156 Mass. 211, 32 Am. St. Rep. 446, 30 N. E. 818. It is a suit for the price of intoxicating liquors sold here. At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that state; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiffs' agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were, and were known by the defendant to be, indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly, the plaintiffs did not act in aid of the defendant's intent beyond selling him the goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.

[58] The principles involved are stated and some of the cases are collected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs' knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to

do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, such as was supposed in the former decision, but, on the contrary, an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (Commonwealth v. Peaslee, 177 Mass. 267, 59 N. E. 55; Commonwealth v. Kennedy, 170 Mass. 18, 22, 48 N. E. 770), the line of proximity will vary somewhat according to the gravity of the evil apprehended (Steele v. Curle, 4 Dana, 381, 385-388; Hanauer v. Doane, 12 Wall. 342, 346; Bickel v. Sheets, 24 Ind. 1, 4), and in different courts with regard to the same or similar matters. Compare Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138, with Pearce v. Brooks, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote: M'Intyre v. Parks, 3 Met. 207; Sortwell v. Hughes, 1 Curt. C. C. 244, 247, Fed. Cas. No. 1377; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5755; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Distilling Co. v. Nutt, 34 Kan. 724, 729, 10 Pac. 163; Webber v. Donnelly, 33 Mich. 469; Tuttle v. Holland, 43 Vt. 542; Braunn v. Keally, 146 Pa. St. 519, 524, 28 Am. St. Rep. 811, 23 Atl. 289; Wallace v. Lark, 12 S. C. 576, 578, 32 Am. Rep. 516; Rose v. Mitchell, 6 Colo. 102, 45 Am. Rep. 520; Jameson v. Gregory, 4 Met. (Ky.) 363, 370; Bickel v. Sheets, 24 Ind. 1, 4; Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; and Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138.

Although a different rule was assumed in Suit v. Woodhall, 113 Mass. 391, it will be seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. M'Intyre v. Parks never has been overruled: Dater v. Earl, 3 Gray, 482; Webster v. Munger, 8 Gray, 584, 587; Adams v. Coulliard, 102 Mass. 167, 172; Milliken v. Pratt, 125 Mass. 374, 376, 28 Am. Rep. 241.

[50] Exceptions to the admission of letters of the plaintiffs' agent to them for the purpose of showing what they knew are not argued.

Exceptions overruled.

Sales Having in View the Subsequent Violation of foreign or domestic law are considered in the monographic note to Graves v. Johnson, 32 Am. St. Rep. 450-456. The sale and delivery of liquors in one state with a view of having them resold in violation of the laws of another will not sustain an action in the former state for the purchase price: Graves v. Johnson, 156 Mass. 211, 32 Am. St. Rep. 446, 30 N. E. 818. Consult, in this connection, Bollinger v. Wilson, 76 Minn. 262, 77 Am. St. Rep. 646, 79 N. W. 109.

CUMMINS v. CHRISTIE.

[179 Mass. 74, 60 N. E. 306.]

A MORTGAGEE OF LAND SOLD FOR TAXES may, as claimant in a trustee process, enforce his equitable lien upon the surplus of the sale in the hands of the city. He is entitled to so much of the fund as his mortgage covers, and the plaintiff in the trustee process, a creditor of the mortgagor, is entitled to the balance. (p. 358.)

Contract on a promissory note against Duncan Christie, as defendant, and the city of Worcester, as trustee.

A. P. Rugg, for the trustee.

No counsel appeared for the other parties.

75 HAMMOND, J. This is an action brought originally in the district court, where the trustee was charged upon its answer. It appealed to the superior court, where it was again charged on its answer. The case is before us upon an appeal from that order, and was submitted upon the brief of the trustee, no other party appearing. William B. Clark voluntarily appeared in the superior court as a claimant and filed a statement of his claim, but nothing more appears in the record concerning it. The only question, therefore, is whether, in this state of the record, upon the facts stated in the answer, the trustee should be charged. Briefly stated, the answer discloses that the city has in its hands money, being the balance of the proceeds of land sold for nonpayment of taxes after satisfying the taxes and charges; that at the time of the tax sale the record title to the land stood in the name of the defendant, subject to two mortgages theretofore given

by him, and that, at the time this suit was commenced, it stood in the name of one Nelson, subject to a mortgage to the claimant. The answer further states that it holds this money for the owner of the real estate in accordance with the provisions of the Statutes of 1888, chapter 390, section 40, by which we understand the trustee to [76] mean that the money is held for the person entitled to it under that statute upon the facts stated.

The statute directs the city to pay such proceeds to the owner of the land at the time of the sale. In Worcester v. Boston, 179 Mass. 41, 60 N. E. 410, it has been recently decided that the term "owner," as used in that section, does not include a mortgagee, unless either he is in possession at the time of the sale or the mortgage is of the kind described in the Public Statutes, chapter 11, section 14, and has been assessed to him as real estate; but it was also decided that, while as between the owner and the city the money belonged to the owner, yet as between him and a mortgagee at the time of sale the latter had an equitable lien upon such proceeds which he could enforce in equity. And we can have no doubt that, where such a mortgagee appears as a claimant in a suit like this, he stands, so far as respects the rights of the attaching creditor, in a situation analogous to that of an assignee of the defendant's interest in the fund to the extent at least of the sum due on the mortgage, and that to that extent the trustee should not be held. The answer of the trustee seems loosely drawn, but we construe it to mean that the mortgage held by Clark, the claimant, at the time of the commencement of the suit, was one of the mortgages in existence at the time of the tax sale, and was then held by him.

Under this construction of the answer, the title of the claimant to the fund in the possession of the trustee to the extent of his claim is better than that of the owner, and, no fraud being shown, the attaching creditor can have no higher right than his debtor. The claimant is entitled to so much of the fund as his mortgage will cover, but if there be anything left the plaintiff can hold it. Since, however, there is nothing in the answer to show that the sum due on the mortgage is equal to that which the trustee discloses in his possession, the trustee must be charged.

Order charging trustee affirmed.

RIGHTS AND REMEDIES OF A MORTGAGEE WHEN THE PROPERTY IS BY JUDICIAL SALE OR OTHER PROCEEDINGS TRANSFERRED SO THAT HE NO LONGER HAS ANY REMEDY BY FORECLOSURE OR SUIT FOR POSSESSION.*

I. Disposition of Mortgaged Property by Judicial Sale.
 a. Proceeds Represent the Property.
 b. Effect of an Execution Sale.
 1. When Mortgage Lien is Senior.
 2. When Mortgage Lien is Junior.
 c. Of an Executor's or Administrator's Sale.
 d. Of a Partition Sale.
 1. In General.
 2. Mortgage Pendente Lite.
II. Disposition of the Property by Public or Quasi Public Authorities.
 a. In General.
 b. Effect of Sale for Delinquent Taxes.
 c. Of Condemnation for Public Use.
 1. Mortgagee as Owner.
 2. Mortgagee's Rights to the Award in General.
 3. When the Award is Paid into the County Treasury.
 4. When Only Part of Property Condemned.

I. Disposition of Mortgaged Property by Judicial Sale.

a. Proceeds Represent the Property.—It is a general principle that when either real or personal property, upon which there is an outstanding mortgage, is turned into money, the rights of the mortgagee continue unaltered. The court will direct the application of the money according to the rights of the parties as they existed prior to the conversion of the property into money: Ball v. Green, 90 Ind. 75; Brown v. Stewart, 1 Md. Ch. 87, 94; Astor v. Miller, 2 Paige, 68. See, too, Roberts v. Williams, 5 Whart. 170, 34 Am. Dec. 549; Mohler's Appeal, 5 Pa. St. 418, 47 Am. Dec. 413; West Branch Bank v. Chester, 11 Pa. St. 282, 51 Am. Dec. 547.

b. Effect of Execution Sale.

1. When Mortgage Lien is Senior.—The question of whether mortgaged property is subject to execution, and, if so, to what extent and in what manner, is not within the scope of the present discussion. Generally speaking, where property is sold under execution, there being upon it the lien of a senior mortgage, the purchaser buys subject to the lien. The lien is not devested by the

*REFERENCES TO MONOGRAPHIC NOTES.

Right of a mortgagee to maintain an action at law to recover judgment on the debt: 73 Am. St. Rep. 559–568.

Rights and remedies of mortgagee against the impairment of his security: 43 Am. St. Rep. 423–436.

sale: McDaniel v. State, 118 Ind. 239, 20 N. E. 739; Collins v. State, 8 Ind. App. 542, 50 Am. St. Rep. 298, 30 N. E. 12; Norman v. Norman, 26 S. C. 41, 11 S. E. 1096. The mortgagee, under this rule, has no right to the proceeds of the sale, since his lien on the property continues to subsist in full force: Harwell v. Fitts, 20 Ga. 723; Hynds Mfg. Co. v. Oglesby, 93 Ga. 542, 21 S. E. 63; Bratton's Appeal, 8 Pa. St. 164, 167; Bank v. Patterson, 9 Pa. St. 311.

However, by the concurrent consent of the mortgagor, the mortgagee, and the levying creditor, the sale may be of the entire interest in the property. Then the proceeds may be applied to the payment of the unforeclosed mortgage according to its priority. In the absence of such consent, only the equity of redemption passes to the purchaser: De Vaughn v. Byrom, 110 Ga. 904, 36 S. E. 267. The general rule that an unforeclosed mortgage cannot be used as a basis of a claim for money in court for distribution (Thorton v. Wilson, 55 Ga. 607) is also subject to qualification when the mortgagee is otherwise remediless: See National Bank v. Exchange Bank, 110 Ga. 692, 36 S. E. 265; De Vaughn v. Byrom, 110 Ga. 904, 36 S. E. 267.

In Walker v. Braden, 44 Kan. 707, 25 Pac. 195, it is decided that when mortgaged personal property is sold under execution, and there are no other liens upon the property except the execution and mortgage liens, the court should, in any proper proceeding instituted for the purpose, order the sheriff, after satisfying the execution with costs and interest, to pay the surplus money to the mortgagee. In this case it appears that the mortgagee waived his priority of lien over the execution creditor, to the extent of the execution claims, by purchasing the property. But it is held that he did not thereby waive his priority of lien and rights to any greater extent, nor as to claims which were not liens on the property.

2. **When Mortgage Lien is Junior.**—If mortgaged real estate is sold under a prior judgment, the mortgagee has the same lien on the surplus moneys resulting from the sale which he had on the property prior to the sale. His lien is simply transferred from the property to the surplus. He is entitled to priority, in the discharge of his lien, over junior judgment creditors: Baker v. Gladden, 72 Ga. 469; Averill v. Loucks, 6 Barb. 470. The sheriff has no right to pay the surplus to the mortgagor. And if the purchaser is allowed to retain the money in satisfaction of an antecedent debt due from the mortgagor, he takes it subject to the lien of the mortgagee: Bartlett v. Gale, 4 Paige, 503.

c. **Of an Executor's or Administrator's Sale.**—In some jurisdictions the lien of a mortgage is not devested by a sale of the property by an executor or administrator in the course of administration, but the property passes to the purchaser subject to the encumbrance: McConnel v. Smith, 39 Ill. 279, 289; Kenley v. Bryan, 110 Ill. 652; Maul v. Hellman, 39 Neb. 322, 330, 58 N. W. 112. In other jurisdictions the mortgage is extinguished by the sale, and

the lien of the mortgage is transferred and attaches to the proceeds of the sale: Newson v. Carlton, 59 Ga. 516; Reed v. Aubrey, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022; Succession of Dejean, 8 La. Ann. 505; Succession of Rhea, 33 La. Ann. 870. And if an heir mortgages the real estate inherited by him, which subsequently is sold by the administrator for the payment of debts, the mortgagee is entitled to the surplus arising therefrom. His lien on the money, in such case, is superior to any claim of the administrator: Ball v. Green, 90 Ind. 75.

When an administrator, without knowledge of an unrecorded mortgage executed by his intestate on real property, sells the land by order of court to make assets to one who is also ignorant of the mortgage, the mortgagee is entitled to the proceeds, in the hands of the administrator, in preference to general creditors: Kirkpatrick v. Caldwell, 82 Ind. 299, citing Andrews v. Burns, 11 Ala. 691.

d. Of a Partition Sale.

1. In General.—In a partition suit the property ordinarily is divided cum onere. Each takes the share allotted to him, subject to the liens that exist upon it: Sebring v. Mersereau, 9 Cow. 344. In case a sale of the property is necessary, the existence of a mortgage thereon is no obstacle: Walker v. Walker, 3 Abb. N. C. 12. If there is no contrary statutory provision, the sale passes title subject to the mortgage encumbrance. For this reason, lienholders are not necessary parties defendant. They cannot be affected by the sale. Unless an arrangement is made between the parties for a conveyance free from the mortgage lien and its payment out of the proceeds, the property will be sold subject to the encumbrance: Becker v. Carey (N. J. Eq.), 36 Atl. 770; Wotten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, 9 Cow. 344.

In Arnold v. Butterbaugh, 92 Ind. 403, it is said that "in actions for partition all lienholders whose liens do not extend to the whole of the real estate are proper parties. If partition is made, the liens follow the tracts of land to which they properly belong when set off in severalty. If the land is sold, the liens are transferred to the fund which is the proceeds of the sale, and satisfied therefrom": See, also, Patterson v. Garvin, 14 Rich. Eq. 55. The New Jersey statute seems to provide, in case the encumbrance is upon the separate interest of a co-owner, that it may be paid out of the proceeds of the sale: See Becker v. Carey (N. J. Eq.), 36 Atl. 770. And in Louisiana, if the mortgage affects only the interest of one co-owner, the mortgagee may be relegated to the proceeds, while the property passes free from the encumbrance: Beltran v. Gauthreaux, 38 La. Ann. 106; Koehl v. Solari, 47 La. Ann. 890, 17 South. 464; Succession of Viard, 106 La. 73, 30 South. 246. See, in this connection, Thompson v. Frew, 107 Ill. 478; Lancaster v. Wolff, 23 Ky. Law Rep. 233, 62 S. W. 717; East Coast Cedar Co. v. People's Bank, 111 Fed. 446.

Section 1539 of the New York Code of Civil Procedure provides that the plaintiff in an action for partition may, at his election, make one who has a lien which attaches to the entire property a defendant; and also provides that if such person is made a party, his entire right and interest, or the proceeds thereof, may be awarded to him by the final judgment. Under this statute it is held that if a mortgagee is brought in as a party defendant, and it is proposed to pay the mortgage from the proceeds of the sale, the costs of the partition action should not be deducted from the proceeds before applying the same in extinguishment of the mortgage, unless the mortgagee unnecessarily increases the costs and expenses of the litigation: Beller v. Antisdel, 84 Hun, 252, 32 N. Y. Supp. 575; Lewis v. Pease, 47 N. Y. Supp. 303, 21 App. Div. 628.

2. **Mortgage Pendente Lite.**—If a co-owner mortgages his interest pending a suit for partition, the purchaser at the partition sale takes the property discharged of the encumbrance. The lien of the mortgage attaches to the proceeds of the sale: Macgregor v. Malarkey, 96 Ill. App. 421; Huffman v. Darling, 153 Ind. 22, 53 N. E. 939, citing Loomis v. Riley, 24 Ill. 307; Church v. Church, 8 Sand. Ch. 434; Cradlebaugh v. Pritchett, 8 Ohio St. 646, 72 Am. Dec. 610; Freeman on Cotenancy and Partition, sec. 479.

II. Disposition of Property by Public or Quasi Public Authorities.

a. **In General.**—When land is turned into money, especially by some act of the public authorities, the general rule is that the lien of one who had a mortgage on the premises extends to the money, and the lien of the mortgagee may be enforced by equitable process. This is an application of the general principle by which in equity one who has a lien on property may follow the proceeds and enforce his lien thereon if there is no remedy at law: Worcester v. Boston, 179 Mass. 41, 50, 60 N. E. 410, citing Wiggin v. Heywood, 118 Mass. 514; Farnsworth v. Boston, 126 Mass. 1; Union Inst. for Savings v. Boston, 129 Mass. 82, 37 Am. Rep. 305; Wood v. Westborough, 140 Mass. 403, 5 N. E. 613.

b. **Effect of Sale for Delinquent Taxes.**—The Massachusetts statutes provide that in case of a tax sale the collector may sell the whole or any part of the land, and after satisfying the taxes and charges shall pay the balance to "the owner of the estate" upon demand. It is held that the word "owner" as here used does not include a mortgagee not in possession if his interest has not been assessed to him as real estate, but that he has an equitable lien on the proceeds of the land, which he can enforce by equitable process: Worcester v. Boston, 179 Mass. 41, 60 N. E. 410. In Alabama, if a chattel mortgage stipulates that the mortgagees may take possession of the property whenever they deem it necessary, and before the mortgage is due the property is sold for taxes, the mortgagees are entitled to the surplus, though the statute provides

that "any balance remaining shall be paid to the owner." The surplus represents the property. The mortgagees are entitled, on demand, to receive it, as they would have been entitled to demand and receive the property itself, had there been no conversion of it into money through the process of a paramount lien. In case the mortgagor and mortgagees both claim the surplus, and the collector pays it to the mortgagor instead of interpleading the claimants, he is answerable to the mortgagor for the amount paid: McDuffee v. Collins, 117 Ala. 487, 23 South. 45.

Under the New York statute revising the charter of the city of Brooklyn, when land is sold for taxes, a mortgagee in possession, whose mortgage constitutes a first lien on the land, is past due, and exceeds the surplus, is not bound to redeem in order to obtain the surplus. He may elect to adopt the sale and be entitled, after the purchaser's right to a deed cutting off the lien of the mortgage on the premises becomes fixed so far as the mortgagee is concerned, to the surplus in the hands of the city or which it has parted with without authority. And this, although there may yet be a redemption by the owner of the land, and the purchaser has not taken a deed: Sutherland v. Brooklyn, 156 N. Y. 605, 51 N. E. 433.

e. Of Condemnation for Public Use.

1. **Mortgagee as Owner.**—The authorities are not harmonious on the question of whether a mortgagee is an "owner" within the meaning of statutes providing for the condemnation of private property for public use on notice to and proceedings against the owner: See Board of Mississippi Levee Commrs. v. Wiborn, 74 Miss. 396, 20 South. 861. If he is made a party to the proceedings, then of course he may receive an award of damages as his interest appears, and his rights be protected. And if, in those jurisdictions where he is considered an owner, he is not notified or made a party, his right of foreclosure is not devested by the condemnation of the mortgage property: Severin v. Cole, 38 Iowa, 463; Dodge v. Omaha etc. R. R. Co., 20 Neb. 276, 29 N. W. 936.

2. **Mortgagee's Rights to the Award, in General.**—But whether or not a mortgagee is considered an owner or a necessary party to condemnation proceedings, it is clear that his interest in the property is entitled to protection. It is a principle of equity that when land is taken by right of eminent domain, the money awarded as damages is considered as the land as to all rights and interests in respect thereto. The money represents the land, and is applied in equity to discharge the liens upon it in accordance with the rights of encumbrancers respecting such land. The lien of a mortgagee who has not been made a party to the proceedings attaches to the fund, and he is entitled prima facie to so much of it as is a substitute for the premises taken from the operation of his mortgage and appropriated to public use: South Park Commrs. v. Todd, 112 Ill. 379; Calumet River Ry. Co. v. Brown, 136 Ill. 322, 331, 26 N. E.

501; Boutelle v. Minneapolis, 59 Minn. 493, 61 N. W. 554; Lumberman's Ins. Co. v. St. Paul, 82 Minn. 497, 85 N. W. 525; Thompson v. Chicago etc. Ry. Co., 110 Mo. 147, 19 S. W. 77; Bright v. Platt, 32 N. J. Eq. 362, 371; Astor v. Miller, 2 Paige, 68; Astor v. Hoyt, 5 Wend. 603; In the Matter of John and Cherry Sts., 19 Wend. 659; Utter v. Richmond, 112 N. Y. 610, 20 N. E. 554; Matter of Rochester, 136 N. Y. 83, 32 N. E. 702; Magee v. Brooklyn, 144 N. Y. 265, 39 N. E. 87; Adams v. St. Johnsbury etc. R. R. Co., 57 Vt. 240.

The mortgagee may arrest the payment of the fund to the mortgagor, and secure its application to the mortgage debt: Board of Mississippi Levee Commrs. v. Wiborn, 74 Miss. 396, 20 South. 861. He may proceed directly against the corporation or municipality to enforce his claim to the damages awarded: Young v. Stoddard, 50 N. Y. Supp. 475, 27 App. Div. 162; Aggs v. Shackelford, 85 Tex. 145, 19 S. W. 1085. See, also, Wood v. Westborough, 140 Mass. 403, 5 N. E. 613. And he may recover, notwithstanding the award has already been paid to the mortgagor: Sherwood v. Lafayette, 109 Ind. 411, 58 Am. Rep. 414, 10 N. E. 89; Wilson v. European etc. Ry. Co., 67 Me. 358; Board of Mississippi Levee Commrs. v. Wiborn, 74 Miss. 396, 20 South. 861; Gray v. Case, 51 N. J. Eq. 426, 26 Atl. 805. See, also, Liverman v. Roanoke etc. R. R. Co., 109 N. C. 52, 13 S. E. 734; Wade v. Hennessy, 55 Vt. 207. Compare Whiting v. New Haven, 45 Conn. 303.

If a fund derived from the condemnation of mortgaged property is in the hands of a third person, who refuses to pay it to either of the parties to the mortgage, for the reason that it is claimed by a judgment creditor of the mortgagor, a court of equity will entertain a bill to determine the rights of the parties and order the fund paid over: Keller v. Bading, 169 Ill. 152, 61 Am. St. Rep. 159, 49 N. E. 436. And if pending the condemnation of land, the owner mortgages it, the mortgagee is entitled to the damages awarded as against a creditor of the mortgagor attaching the fund by process subsequent to the mortgage: Brooks v. Hubbard, 73 Vt. 122, 50 Atl. 802.

3. **When the Award is Paid into the County Treasury**, as required by law, the mortgagee may resort to the fund, if equity requires, where a right of way over the mortgaged premises has been taken: Chicago etc. R. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. 1105. And when, by mistake, the mortgagee is not made a party to the condemnation proceedings, and the railroad corporation pays the compensation to the county treasurer for the benefit of the owner, without having discovered the existence of the mortgage, the company may restrain, by a bill in equity, the payment of such compensation to the mortgagor, and have it paid to the mortgagee: Calumet River Ry. Co. v. Brown, 136 Ill. 322, 26 N. E. 501. But it is held that if an award to the mortgagor is deposited with the treasurer and is paid out by him to the mortgagor, the mortgagee

cannot maintain an action against the treasurer and his bondsmen for the recovery of the money due on the mortgage: Armstrong v. Moore, 1 Kan. App. 450, 40 Pac. 834.

4. When Only Part of Property Condemned.—When a mortgagee resorts to such property as remains unaffected by the condemnation proceedings, and thereby through foreclosure satisfies the debt secured, with costs and charges, his lien on the award terminates: Boutelle v. Minneapolis, 59 Minn. 493, 61 N. W. 554. Though it may be otherwise if there is a deficiency: Home Ins. Co. v. Smith, 28 Hun, 296. A mortgagee of premises, a part of which is condemned, cannot complain that the court directs the damages to be paid to the mortgagor, and requires him to restore the property to its former value: Stopp v. Wilt, 177 Ill. 620, 52 N. E. 1028.

LONERGAN v. WALDO.

[179 Mass. 135, 60 N. E. 479.]

DAMAGES, MEASURE OF.—IF GOODS SOLD ARE NOT DELIVERED, the measure of damages usually is their market value at the time and place at which they should have been delivered, with interest. But when special circumstances are known to both parties, and they contract in reference thereto, the one in default may be answerable for whatever damages the other sustains as the reasonable and natural consequences of a breach under the circumstance contemplated. (p. 368.)

DAMAGES AGAINST VENDOR.—ONE WHO SELLS PIPE to a contractor to lay in a ditch already dug, and who is notified that in the event of rain the ditch will cave in, may be liable for the cost of redigging the ditch, which, because of the nondelivery of the pipe, is washed in by a rain as apprehended. (pp. 366, 370.)

Contract by a contractor to recover the expense of redigging a ditch washed in by a rainstorm by reason of the failure of the defendant to deliver pipe for use in the ditch, which was ordered from him and paid for by the plaintiff.

A. S. Hayes, for the plaintiff.

G. A. O. Ernst, for the defendant.

136 BARKER, J. The question whether the verdict was ordered rightly must be considered upon the state of facts most favorable to the plaintiff, which fairly could have been found if the case had been left to the jury.

He contended that he was entitled to large damages because of the caving in of a ditch resulting from the nondelivery of

six-inch drain pipe bought of the defendant on May 1, 1893, for the price of thirteen dollars and fifty cents, then paid.

From his testimony it could be found that he first ordered the pipe on Thursday, April 28th, by telephone, and that in giving the order he said that he was out of such pipe, and had his ditch all ready waiting for it, and a great deal of material on the bank, and that he could not leave it there very long; also that the answer to his order was that the pipe would be sent in the afternoon; that the pipe did not come, and the plaintiff several times told the defendant's agent over the telephone that it was necessary that the pipe should come out; that if a rainstorm should come there was no possible chance of saving the ditch, as they were down twenty-four feet and there was a large amount of material on the banks.

The plaintiff further testified that on Monday, May 1st, he was informed that the trouble was that he had reached the limit of his credit with the defendant; that he then went to the latter's office, was referred from one man to another and another, to the last of whom he told the dangerous condition he was in at the work and how much he was in need of the pipe; that he told them the condition of the ditch, that it was down twenty-four feet, and about nine or ten feet wide, and would certainly cave in if there should be a rainstorm; that they desired cash for any more goods, and thereupon he gave a check for the price of the pipe, and asked if they would attend to it right away; that they said that they would; that the pipe would be out there [187] perhaps before he was, and thereupon he went back to the work; that at noon, on Monday, the pipe had not reached the work, and he then telephoned again and asked where the pipe was, and was answered that it would be out there in the afternoon, sure; that he then waited until Tuesday morning, and then asked by telephone why the defendant would not send the pipe, saying that the defendant knew the plaintiff's condition at the work, and what the consequence would be, and was answered that the defendant would immediately attend to it; that no pipe came on that day, Tuesday, May 2d, and none came on Wednesday, May 3d, until after the plaintiff's men had gone home; and that the pipe which so came was not six-inch pipe as ordered and purchased but eight-inch pipe, which he could not place in the ditch, and which he would not be allowed to use in it; also that a rainstorm came on during Wednes-

day night, and on Thursday about noon the ditch was washed in, at a loss to him of about twelve hundred and forty dollars.

The plaintiff also testified that the ditch was sheathed with plank and was braced, and that he had taken all the precautions to prevent its caving in which could be taken, and that the weather was threatening, and that he made no effort in any other direction to get the pipe. He also testified upon his cross-examination, as follows:

"Q. When they kept promising you and kept disappointing you, did you make any effort in any other direction to get that pipe? A. No.

"Q. Do you know that within an eighth of a mile from your place there was a store that had been established for thirty years which kept drain pipe, and which could have furnished you that pipe at practically a moment's notice? A. I think I had gone to them, as you have refreshed my memory, and I think I have got six-inch pipe, all they had there, I think, I have bought—

"Q. You did buy some six-inch pipe from Balkam, did you? A. I can't swear to it, but I am very sure I went down there for six-inch pipe. I didn't buy any prior to this time.

"Q. You knew where the store was? A. I didn't know that they had six-inch pipe.

"Q. You didn't inquire? A. I must have inquired if I found out that he had it. I think I was down to him to buy some nails—some things like that, little incidentals that we would want."

128 The defendant offered evidence tending to show that no conversations occurred over the telephone or at his store such as the plaintiff testified to; that nothing was said about the danger to the ditch; that no suggestion was made as to any special haste; that the pipe was sold to be, and was, delivered in the usual course of business the next day, May 2d.

Experts called by the defendant testified that there was a perfectly practical way of protecting the ditch in question against caving in, and that if the plaintiff had used it the ditch would not have caved in.

Sewall D. Balkam, called by the defendant, testified that his place of business was, and had been since 1872, on Centre street, Jamaica Plain, about five or six minutes' walk from where the plaintiff was at work on the corner of Weld Park and the same street, Centre street; that at the time in ques-

tion he dealt in six-inch pipe, and had it in stock for sale, and that its then fair market value in Jamaica Plain, delivered at Weld Park, was ten to twelve cents a foot, or from fifteen dollars to eighteen dollars for one hundred and fifty feet.

In reply to a question from the court the plaintiff's counsel said that he did not claim to recover for any delay in delivery prior to May 1st when the pipe was paid for. In reply to another question from the court he said that he did not want to go to the jury on any question of damage other than the damage done by the washing in of the ditch, and the expense entailed in rebuilding the ditch.

The court ruled, on taking the case from the jury: "I do not think that the plaintiff can recover in this action, which is an action of contract, for the damage done to the trench or ditch by the rainstorm, or for the expenses incurred in repairing that damage. The plaintiff's counsel says that is the damage which he seeks to recover for, and the other damage will be so slight that he does not care to go to the jury upon it. In view of this statement I will order a verdict for the defendant, and the plaintiff excepts."

Upon this state of the evidence it could not be ruled as a matter of law that the plaintiff was negligent in relying wholly upon the expected delivery, and in making no effort to get pipe elsewhere; nor in the means which he used to protect the ditch [139] from caving in. It could be found from the evidence that the purchase and sale were made upon a full disclosure of the special circumstances to which the plaintiff testified, and that both parties acted upon full knowledge that the pipe sold was bought by the plaintiff to be used in a ditch such as was described in his testimony; and that at the time of the sale, the caving in of the ditch was to be apprehended reasonably as a consequence of delay, and if the delay should be caused by failure to deliver the pipe, the caving in might be found to be a damage which ordinarily would follow the breach.

If goods sold and paid for are not delivered the measure of damages usually is their market value at the time and place at which they should have been delivered, with interest thereon: Cutting v. Grand Trunk Ry. Co., 13 Allen, 381, 385. But special circumstances may make the vendee's actual loss greater than the sum given by this common rule. When owing to special circumstances such greater damages are in

fact sustained, it is clear that they cannot be recovered of the party in fault, unless the special circumstances which made it reasonable to expect that the greater damages would naturally ensue were, at the time when the contract was made, within the knowledge of both parties: Batchelder v. Sturgis, 3 Cush. 201, 204; Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Scott v. Boston etc. Steamship Co., 106 Mass. 468, 471; Harvey v. Connecticut etc. R. R. Co., 124 Mass. 421, 26 Am. Rep. 673; Swift River Co. v. Fitchburg R. R. Co., 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015.

When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with reference to which the parties acted. In such cases the larger damages may be recovered, as having been in the contemplation of both parties, and as naturally resulting, under the special circumstances, from the breach itself: Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Townsend v. Nickerson Wharf Co., 117 Mass. 501, 503; Manning v. Fitch, 138 Mass. 273, 276.

But it is equally obvious that when special circumstances exist [140] and are known to both parties, a vendor may decline to assume any larger responsibility for a breach of his engagement than that to which he would be subjected by the common rule of damages. If, in the present instance, the defendant upon being told of the condition of the ditch had notified the plaintiff that if the pipe should not be delivered seasonably the defendant would not be answerable for the loss if the ditch should cave, it would be unjust to hold the defendant for the loss. The defendant cannot be so held, justly, unless at the time of the sale he in substance assented that he would be so held.

It is not contended that there was an express assent. Therefore, the vital question is whether such assent could have been found from the evidence. When one of two contracting parties stands in such a relation as compels him to render the service for which he contracts—as, for instance, in that of a common carrier—it might be unfair to infer, from his undertaking to do the service with knowledge of the special

circumstances and without a protest, that he assented to any unusual obligation. Upon this question we express no opinion. But in the present case the defendant was under no obligation to sell the pipe. He could contract or not as he chose. If, knowing all the circumstances, the defendant sold the pipe without any protest or statement that he would in no event be liable for a caving of the ditch, he might be found by the jury to have assented to be bound to pay damage for its caving if that should be caused by breach of his contract to deliver the pipe: See Grebert Borgnis v. Nugent, 15 Q. B. Div. 85, 89; Mayne on Damages, 5th ed., 41; Horne v. Midland Ry. Co., L. R. 8 C. P. 131, 141; Benjamin on Sales, 6th Am. ed., secs. 872, 874.

Therefore, upon the evidence, it was wrong to direct a verdict for the defendant.

Exceptions sustained.

The Measure of Damages for failure to deliver goods sold is, according to the most equitable general rule, the value of the goods at the time they were to be delivered, with interest: Pope v. Campbell, Hardin, 81, 3 Am. Dec. 722; Cole v. Ross, 9 B. Mon. 393, 50 Am. Dec. 517; Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58. The rule of damages in such cases is usually stated to be the difference between the contract price and the market value at the time and place of delivery: Caldwell v. Reed, Litt. Sel. Cas. 366, 12 Am. Dec. 314; Fink v. Tatman, 86 Ind. 259, 10 Am. Rep. 19; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; McGrath v. Gegner, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717. It may be said that damages for the violation of a contract includes all damages caused by the breach, or such as, being incidental thereto, may reasonably be presumed to have been in the contemplation of the parties when they made the contract: Spencer v. Hamilton, 113 N. C. 49, 37 Am. St. Rep. 611, 18 S. E. 167. All damages resulting necessarily, immediately, and directly from the breach of a contract of sale are recoverable: Trigg v. Clay, 88 Va. 330, 29 Am. St. Rep. 723, 13 S. E. 484. See, also, Reiger v. Worth, 127 N. C. 230, 80 Am. St. Rep. 798, 37 S. E. 217; Hellman v. Pruyn, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97.

O'BRIEN v. MAHONEY.

[179 Mass. 200, 60 N. E. 493.]

PARTITION.—EVERY COTENANT IS ENTITLED to a partition as a matter of right. (p. 372.)

PARTITION.—ONE OF TWO HEIRS IS ENTITLED to a partition of the estate of their ancestor while it is in course of settlement in the probate court. (pp. 371, 375.)

C. F. Jenney, for the respondent.

F. Rackermann and J. D. Colt, for the petitioner.

202 HAMMOND, J. Upon this petition filed in the probate court by one of the two heirs of Dennis Mahoney, deceased, intestate, the court ordered a partition to be made. The respondent appealed, and in support of the appeal insists that the settlement of the estate has not reached such a stage as to make it proper to order partition, because there is a large claim still pending against the estate and the land in question is liable to be sold for the payment of debts. It appears in the statement of agreed facts that the uncontested charges against the estate exceed the amount of personal property shown in the inventory, and that the respondent in the account filed in the probate court asks to be allowed several thousand dollars which he claims to be due to him from the estate. If his claims are finally sustained in full, the amount due him will exceed the inventoried value of both the real and personal estate, the real estate being inventoried at nearly nineteen thousand dollars, and the personal at less than four hundred dollars. This account, upon motion of the petitioner, was referred by the probate court to an auditor, who is still engaged in the hearing. From the nature of the claim it is possible that the litigation may continue for some time.

Neither as administrator, nor as creditor, is the respondent interested in this question, because partition, if made, cannot affect him in either capacity. His only standing in this proceeding 203 is as a tenant in common with the petitioner, and the question is whether against him as such the partition at this time should be ordered.

By the common law of England, the writ of partition could issue only in favor of a parcener, but quite early the remedy was extended by statute to joint tenants and tenants in com-

mon of estates of inheritance, of freehold, and for years: Coke on Littleton, 167 a; Stats. 31 Henry VIII, c. 1; Stats. 32 Henry VIII, c. 32; Allnatt on Partition, 53, 56. The common law, as thus modified by statute, became a part of our common law when our ancestors came to this country, and was recognized by our provincial statutes: 6 Dane's Abridgment, 479, sec. 3; Cook v. Allen, 2 Mass. 462; Mussey v. Sanborn, 15 Mass. 155; Prov. Stats. 1693, c. 8; 1 Prov. Laws, state ed. 122; Prov. Stats. 1753-54, c. 18; 3 Prov. Laws, state ed., 710; Anc. Chart. 258, 603; and afterward by the statutes of the commonwealth; and to this day the writ may be used here: Stats. 1785, c. 62, sec. 2; Rev. Stats., c. 103, sec. 1; Gen. Stats., c. 136, sec. 1; Pub. Stats., c. 178, sec. 1; although for two generations it has been abolished in England: Stats. 3 & 4 William IV, c. 27, sec. 36.

But the writ failed to meet the exigencies which frequently arose in practice, and the same reasons which led to the jurisdiction of equity in England over cases of partition led in this province and state to the introduction of a method of partition by proceedings under a petition, either in a common-law court, or before a judge of probate; and this remedy, extended and improved from time to time, has substantially superseded in practice the old writ: See, among others, Prov. Stats. 1748-49, c. 12; 3 Prov. Laws, state ed., 426; Prov. Stats. 1753-54, c. 18; 3 Prov. Laws, state ed., 710; Anc. Chart. 568, 603; Stats. 1783, c. 41; Rev. Stats., c. 103; Gen. Stats., c. 136; Pub. Stats., c. 178. The writ at common law issued as of right, and the title of petitioner being established, partition was ordered as of course, even to the great inconvenience and loss of the parties. The great weight of authority is that every cotenant is entitled as matter of right to a partition: Allnatt on Partition, 85; Freeman on Partition, sec. 433, and cases there cited; Parker v. Gerard, Amb. 236; Hanson v. Willard, 12 Me. 142, 147, 28 Am. Dec. 162.

And such is the rule under our statutory proceedings. This court in Mitchell v. Starbuck, 10 Mass. 5, 12, said: "It is essential [204] to an estate in common to be subject to partition"; in Potter v. Wheeler, 13 Mass. 504, 507: "It is always in the power of one tenant in common to enforce a partition"; and in Crocker v. Cotting, 170 Mass. 68, 70, 64 Am. St. Rep. 278, 48 N. E. 1023: "Partition is a matter of right." In this latter case, some of the leading authorities were cited: See, also, Pub. Stats., c. 178, sec. 1. No man can be held to a

tenancy in common of land without his own consent. This rule is at once the privilege and burden of such ownership.

Upon the death of the intestate, the land in question went to his heirs, the petitioner and the respondent, as tenants in common. If needed, a part or the whole of it may be sold by the administrator for the payment of claims against the estate, but until so sold, the title is in the heirs. It is not suggested that it cannot be physically divided so that each tenant can hold in severalty. It may be that hereafter the land, or some part of it, may be sold for the payment of debts, but it is not certain that any of it will be, or that, if any is sold, the equality of the partition will be substantially disturbed. Indeed, if there be a partition, and a sale afterward is necessary, it is within the power of the probate court to see to it that the land selected for sale be such that the equality be not disturbed. To say that there shall be no partition until it is apparent that neither of the parties can be evicted by any sale by the administrator, is to say that, in cases where any part of the land may be needed for the debts, the heirs shall be deprived of a right to partition, as to any of it, and cannot have the consolation of individual ownership during the little time the law casts the title upon them. The litigation over this account of the administrator may extend for years, and meanwhile upon this theory the petitioner must endure the inconveniences of common ownership.

Nor can any injustice be done to the parties. In case of any eviction by sale after the partition, the evicted party is not without remedy. Such eviction would be by a title older and better than that of the parties to the partition, and would come within the terms of Public Statutes, chapter 178, section 43. It is true that this section as originally enacted was made applicable only to a partition by proceedings in the common-law courts, but it was simply declaratory of the common law. By that law a parcener, in case of eviction, could defeat the partition or obtain a recompense [205] for the part she lost, and the right of recompense pro rata was given by the statutes of Henry above mentioned to joint tenants and tenants in common: Coke on Littleton, 174a; Stats. 31 Henry VIII, c. 1, sec. 3. And this is a part of our common law, and the rule prevails in the statutory proceedings in our common-law courts. In Cook v. Allen, 2 Mass. 462, 473, wherein the court had occasion to consider the effect of a partition made in this court under a statutory proceeding, Parsons, C. J., said that

if a right of possession passed by the judgment of partition so that the petitioner "became sole seised under it, then, if the owner should bring his writ of right, and evict him by a title paramount, he would be entitled to a new partition of the residue." The rule stated in Public Statutes, chapter 178, section 43, that, if the tenant was evicted of any part of the share assigned to him he might have a new partition of the residue as if no partition had been made, first appears as a statute in Revised Statutes, chapter 103, section 42, and was there inserted upon the recommendation of the commissioners, who say in a note that the "rule is taken from the opinion of the court in Cook v. Allen, 2 Mass. 473, and is in accordance with the common law on the same point": See, also, the cases cited in Freeman on Partition, sec. 533. It is true that this petition is in the probate court and, in view of the peculiar language of the early statutes conferring upon that court the power to make a distribution of land among the heirs of an estate in process of settlement therein (see Prov. Stats. 1692-93, c. 14; 1 Prov. Laws, state ed., 43; 1760-61, c. 13; 4 Prov. Laws, state ed., 400; Anc. Chart. 230, 634; Stats. 1783, c. 36, sec. 4; Stats. 1817, c. 190, sec. 24) and of the limited jurisdiction of that court, there might be a question as to whether this rule was applicable to a partition made therein. But by Statutes of 1869, chapter 121, probate courts were empowered to make partition of lands held by joint tenants, parceners, and tenants in common, when the shares are not in dispute, in all cases. Statutes of 1874, chapter 266, repealed this statute, but provided that such courts should have concurrent jurisdiction with the supreme judicial court and the superior court of petitions for the partition of lands held by joint tenants, coparceners, or tenants in common, in cases where the shares do not appear to be in dispute or uncertain, with a proviso that, whenever in the progress of the case it appears to the judge that the [206] shares are in dispute or uncertain, "the court may order the case removed to the superior court, and the case shall be so removed at the request of any party in interest." This statute was re-enacted in Public Statutes, chapter 178, sections 45-47.

The probate court, in exercising jurisdiction under this statute, must be held to be doing the same work with like result to all parties, as if it were done in either of the other courts; and Public Statutes, chapter 178, section 43, must be held applicable to the work thus done and the rights of the

parties under it. While the petition in this case recites that the estate of the ancestor is in course of settlement in the court, still it gives the names of the parties, sets out the respective shares and proportions, and alleges that they are not in dispute or uncertain; and the decree of the court recites that the shares or proportions are not in dispute. This finding gives the court jurisdiction under Public Statutes, chapter 178, section 45, whether the estate of the ancestor is in course of settlement or not, as to which the decree in this case makes no recital.

Under these circumstances, we see no reason why the land should not be divided.

Decree affirmed.

Partition is, as a general rule, a matter of right: Crocker v. Cotting, 170 Mass. 68, 64 Am. St. Rep. 278, 48 N. E. 1023; Martin v. Martin, 170 Ill. 639, 62 Am. St. Rep. 411, 48 N. E. 924; Wilson v. Bogle, 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386; Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778, 8 South. 715. Partition in connection with the distribution of the estates of decedents is considered in the monographic note to Buckley v. Superior Court, 41 Am. St. Rep. 140-151. Partition of contingent or future conditional interests in land is considered in the monographic note to Aydlett v. Pendleton, 32 Am. St. Rep. 778-782. And who may compel partition is considered in the monographic note to Nichols v. Nichols, 67 Am. Dec. 703-712. Heirs are not entitled to a partition among themselves while the lien of the administrator, for the payment of the intestate's debts, remains upon the land: Hubbard v. Ricart, 3 Vt. 207, 23 Am. Dec. 198.

BREWER LUMBER COMPANY v. BOSTON AND ALBANY RAILROAD COMPANY.

[179 Mass. 228, 60 N. E. 548.]

THE RIGHT OF STOPPAGE IN TRANSITU may be exercised as to goods stored by a carrier at their journey's end and as to which the purchaser has not discharged the carrier's liens, unless the carrier has agreed with the purchaser to hold them as his bailee or agent. (p. 378.)

PAYMENT.—THE RULE THAT A PROMISSORY NOTE given by a debtor to his creditor is presumed to be payment has little or no application to a lien creditor who tenders the note to the maker in court. (p. 381.)

THE RIGHT OF STOPPAGE IN TRANSITU may be exercised, though the vendor has accepted the vendee's promissory note and receipted his bill for the goods, if he tenders the note in court

to the maker's assignee in bankruptcy. The fact that the note was indorsed to a bank for collection or was indorsed by it is immaterial. (pp. 380, 382.)

F. Paul and F. F. Haskell, for the defendant.

E. N. Hill, for the plaintiff.

[228] LATHROP, J. This case comes before us in a somewhat unsatisfactory manner. It is a report of a justice of the superior [229] court, before whom the case was tried without a jury. The report sets forth certain facts, certain evidence and requests for rulings by both parties, which were passed upon, and a general finding for the plaintiff, without any findings of specific facts. The report concludes as follows: "Upon the foregoing evidence the court found for the plaintiff, and now, with the assent of both parties, reports the case for the determination of the supreme judicial court, both parties agreeing that if upon the foregoing evidence the rulings and refusals to rule and finding were right, judgment is to be entered for the plaintiff in accordance with the finding; otherwise, judgment is to be entered for the defendant." The word "evidence" is shown by another paragraph in the report to include statements of facts, documentary evidence and testimony of witnesses. As this is an action at law, the only question can be whether the evidence warranted the finding. We have no right, if the testimony of witnesses is conflicting, to decide the case upon a view of the testimony which we might take if the evidence were before us for our decision.

The action is replevin of a carload of lumber sold by the plaintiff to George A. Paul, a lumber dealer at Boston, and forwarded by the plaintiff over the defendant's railroad from East Saginaw, Michigan, to him. The plaintiff claimed the lumber by reason of the exercise of the right of stoppage in transitu; and the action was defended by the trustee in bankruptcy of Paul.

The lumber was sold on January 26, 1898, for the sum of six hundred and seventy-eight dollars and twenty-eight cents, Paul to pay the freight, and to deduct it from the amount of the invoice. The terms of the payment were to be two per cent off for cash, if paid within ten days, or a three months' note from date of invoice. On January 31, 1898, the lumber was duly shipped, consigned to Paul, and the invoice forwarded to him. On February 19, 1898, the lumber arrived at the Huntington avenue yard of the defendant in Boston, and Paul was notified of the fact by the agent of the defend-

ant, by a postal card, which, in addition to the notice of the arrival of the car, contained the following: "If not unloaded within ninety-six hours from February 19th, 6 o'clock P. M. of this date, Sundays and legal holidays not included, the freight will [230] be subject to storage charges, as per rules of the Massachusetts and the New Hampshire Car Service Association." On March 4, 1898, the defendant stored the lumber in one of its sheds at its Huntington avenue yard, and notified Paul of the fact. On March 10, 1898, Paul sent a promissory note for three hundred dollars, dated the same day, and payable to the plaintiff's order at any bank in Boston. This note was indorsed by the plaintiff payable to order of Second National Bank, and under the name of the plaintiff were the letters "B. D." This note was protested on June 10, 1898. On March 11, 1898, the plaintiff sent a letter to Paul, stating that it had placed the three hundred dollar note to his credit, and calling his attention to the fact that the date of the note, March 10th, was not in accordance with the contract, which called for a three months' note from the date of the invoice, and requested a settlement for the balance. On March 26, 1898, Paul sent the plaintiff a promissory note for three hundred and thirteen dollars and sixty-eight cents, dated that day, and payable to the order of the plaintiff at any bank in Boston. This note was indorsed in the same way as the other, and it was protested on June 28, 1898.

These notes, the report states, were sent to the plaintiff in payment for the full value of the lumber, with interest added from the date of the invoice to the dates of the notes, less freight, which was to be deducted from the amount of the invoice. On receipt of the second of the notes, the plaintiff sent to Paul a statement of account, dated January 31, 1898, stating the terms of sale, the items of the lumber, and the amount due, less freight, being six hundred and seven dollars and sixty-one cents. Across the face of the paper was written:

"Received settlement as follows:

3 mos. note from March 10 /98	$300.00
3 mos. " " " 28 /98	313.68
	613.68"

This paper also contained a request for the freight receipt, which was not sent, nor was the freight paid by Paul.

On April 9, 1898, Paul made a common-law assignment of all his property for the benefit of his creditors, and the as-

signee accepted the trust. The plaintiff was notified of the assignment, and a representative of the plaintiff attended the first meeting of [231] Paul's creditors. On April 16, 1898, the plaintiff gave notice to the defendant not to deliver the lumber to Paul, and requested the defendant to keep it on storage for it, claiming the right of stoppage in transitu.

On July 27, 1898, the plaintiff's attorney tendered the notes of March 10th and March 28th to Paul's assignee, who refused to receive them; and at the trial of this case they were again tendered and refused. This action was brought on August 30, 1898, and before obtaining the lumber the plaintiff was obliged to pay the defendant its claim for freight and storage.

We find it unnecessary to state the testimony of witnesses at this point, though we shall refer to some of it hereafter.

There being no contention that Paul was not insolvent, the principal questions of law in the case are whether the transit had ended, and what the effect was of giving and receiving the notes.

1. As to the first question, we are of opinion that the transit was not ended when the plaintiff asserted its right to the lumber. It makes no difference whether the goods are in the hands of the carrier qua carrier, or whether he puts them at the journey's end in a warehouse. In other words, the transit does not terminate until the goods arrive in the possession, actual or constructive, of the purchaser: Seymour v. Newton, 105 Mass. 272, 275; Mohr v. Boston etc. R. R. Co., 106 Mass. 67; Durgy Cement etc. Co. v. O'Brien, 123 Mass. 12; Inslee v. Lane, 57 N. H. 454. So long as the carrier or a warehouseman acting for him is in possession of the goods, he has a lien for the freight or other charges. The purchaser is not in possession or entitled to possession until he discharges the liens, and the right of stoppage in transitu remains: See Benjamin on Sales, 7th Am. ed., 915 (2), and cases cited.

While the position of the carrier may be changed to that of bailee or agent for the purchaser of the goods, yet that is a question of an agreement between the carrier and the purchaser: Jackson v. Nichol, 5 Bing. N. C. 508; James v. Griffin, 2 Mees. & W. 623; Ex parte Barrow, 6 Ch. Div. 783; Ex parte Cooper, 11 Ch. Div. 68; Kemp v. Falk, 7 App. Cas. 573, 584; McLean v. Breithaupt, 12 Ont. App. 383; Calahan v. Babcock, 21 Ohio St. [232] 281, 8 Am. Rep. 63; Jeffries v. Fitchburg R. R. Co., 93 Wis. 250, 57 Am. St. Rep. 919, 69 N. E. 424; Symns v. Schotten, 35 Kan. 310, 10 Pac. 828.

In the case before us an attempt was made by the trustee in bankruptcy to show that such an agreement was made, but the testimony of Paul falls far short of this. He testified that within a few days after receiving the postal card of February 19th, he telephoned to the defendant to store the lumber. He was then asked, "What did they say to you?" and his answer was: "'All right,' or something to that effect." He was then asked, "Will you say that they said anything?" and answered: "They probably said, 'All right.' They might say, 'Yes, all right,' or something like that." He was again asked, "What did they say?" and answered, "I don't know." On redirect examination he testified that he did not know whether he received any reply to his telephone message, and, in answer to the next question but one, testified that he did receive a reply. It seems to us that the judge might well disregard this testimony as too uncertain and vague for consideration. But if it was to be taken into consideration, the testimony of Turner, the freight agent of the defendant in charge of the Huntington avenue yard, was contradictory to that of Paul. He testified that he remembered the car of lumber, and stored it in the ordinary course of business, and that he received no directions from anyone to store it. If the testimony of Paul can be said to contradict this, it was for the judge sitting without a jury to decide what the fact was.

We are therefore of opinion that the judge rightfully refused to rule, as requested by the defendant, that the plaintiff had lost the right of stoppage in transitu, or had not seasonably exercised that right.

It follows, from what we have said, that the third ruling given at the request of the plaintiff was correct. This ruling was as follows: "The storage of the lumber in question by the defendant, whether according to the custom of storing after the expiration of the limit of time set forth in the notice given by the defendant to the consignee, or in accordance with the notice to store given by the consignee, does not terminate the transit, without evidence of the attornment by the defendant to the consignee, or an agreement to hold as the agent of the consignee."

233 The fourth ruling given was as follows: "The existence of the defendant's lien for the unpaid freight raises the presumption that the defendant continued to hold the merchandise as carrier, and in order to rebut this presumption there must be some proof of some agreement or arrangement be-

tween the defendant and Paul, whereby the defendant, while retaining its lien, became the agent of Paul to keep the goods for him."

While we do not think that this ruling is well expressed, we are of opinion that no harm was done in giving it. We have already stated the law bearing on this subject, and need not repeat it. The undisputed facts in the case showed that the defendant was holding the lumber for the freight and other charges; and it made no difference whether the goods remained in the car or in the warehouse, unless there was proof of some agreement or arrangement, whereby the defendant became the agent of Paul. Taking the ruling as a whole, we are of opinion that it means no more than this.

2. The next question is as to the effect of the giving of the notes. The instructions requested by the defendant on this point are the first and second, and are as follows:

"1. If the consignee, intending to pay for the lumber according to agreement, gave to the plaintiff his negotiable promissory notes, dated at Boston, Massachusetts, and payable on time at said Boston, and thereupon the plaintiff receipted its bill for the lumber, and there was no agreement that said notes were accepted as conditional payment, then the law presumes that such notes were given and accepted as absolute payment, and in that case the plaintiff is not an unpaid vendor and has no further right on the lumber, and must seek his remedy on the notes.

"2. The notes constituted a contract to be construed according to the law of Massachusetts. It is the law of Massachusetts that a negotiable promissory note, given in payment of an obligation, is to be deemed to be given and taken as absolute payment of such obligation in the absence of evidence that the parties intended it to operate only as a conditional payment."

On these requests the judge ruled "that while the rules of law in the first and second requests were correct as general statements, they did not, on the evidence, require a finding for the defendant."

[234] The rule in Massachusetts, in simple contract debts, is that a promissory note given by a debtor to his creditor is presumed to be a payment; that the presumption is one of fact and not of law, which may be rebutted and controlled by evidence that such was not the intention of the parties.

In Curtis v. Hubbard, 9 Met. 322, 328, it is said by Chief Justice Shaw: "The rule adopted in Massachusetts, that a negotiable promissory note, given for a simple contract debt, shall be deemed payment, is to be taken with considerable qualification. It is founded on the consideration, that when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor (and generally more so) to sue on the note, as on the original consideration, and so there is no reason for considering the original simple contract as still subsisting and in force; and therefore a presumption arises that it was intended by the parties that the note should be deemed a satisfaction. But this is a presumption of fact, which may be rebutted by evidence showing that it was not so intended; and the fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended."

In a late case the reason of the rule was stated to be for the protection of the debtor, who might otherwise be compelled to pay both the note and the debt, and it is further said: "But full protection is given to him if, in the proceedings to enforce the original debt, it is shown that he has not paid the note, and that it is then owned by the creditor, and if it is surrendered in court for the benefit of the maker": Davis v. Parsons, 157 Mass. 584, 588, 32 N. E. 1117.

It is obvious that the rule can have little or no application, where a person has a lien, which is a valuable right, and that the court would be slow to deprive a lien creditor of the right to enforce his claim on the ground that he had taken a worthless negotiable promissory note, where the note was produced at the trial and tendered to the maker or to his representative, whether the above-mentioned reasons for the rule are the final ones or not.

Thus in Arnold v. Delano, 4 Cush. 33, 50 Am. Dec. 754, a vendor's lien at common law was enforced, notwithstanding a promissory note was given, and also a receipt for the price; and it was said by [235] Chief Justice Shaw that a lien for the price is incident to the contract of sale; that when a credit is given, the vendee has a right to take possession of the goods, and if he does so the lien is gone. It was then added: "But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or

insolvent and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier or middleman on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage in transitu, then his lien is restored, and he may hold the goods as security for the price." In respect to the contention that the note was payment, it was said: "We think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties."

If this is true of a vendor's lien, it is equally true of the right of stoppage in transitu, which is merely an extension of the vendor's lien: Grout v. Hill, 4 Gray, 361, 366, per Shaw, C. J. See also, 1 Parsons on Maritime Law, 340, and cases cited in note 2.

In Seymour v. Newton, 105 Mass. 272, the goods were to be paid for by a draft at three days' sight. The draft was accepted but was not paid, and it was held that neither the acceptance of the draft, nor the sending to the purchasers of an account, in which they were credited with the draft, prevented the plaintiffs from stopping the goods in transitu. To the same effect is Mohr v. Boston etc. R. R. Co., 106 Mass. 67. See, also, In re Batchelder, 2 Low. 245, 248, Fed. Cas. No. 1099.

There is some contention on the part of the trustee in bankruptcy that the notes were negotiated. There was no evidence in the case to show the meaning of the letters "B. D.," and the fact that the notes were indorsed by the plaintiff to the order of the Second National Bank is not important. Whether they were sent to that bank for collection or were discounted by it is immaterial. They were not paid by Paul, and were tendered by [236] the plaintiff to the common-law assignee and to the trustee in bankruptcy. The facts that the plaintiff was then in possession of the notes and tendered them is all that is required: Davis v. Parsons, 157 Mass. 584, 588, 32 N. E. 1117.

It follows that the second ruling requested by the plaintiff, as modified by the judge, was rightly given. This ruling so modified was as follows: "That the giving of the two notes in payment for the lumber according to the agreement, while

in form negotiable, does not prevent the right of stoppage in transitu, as they remained in the hands of the vendor, and ready to be delivered up."

Nor do we regard it of importance that on receipt of the last note the plaintiff sent to Paul a statement of the account between them. The report does not show that this statement was signed by the plaintiff. But if it were so signed, the case would stand no stronger for the defendant than if the statement had been "Received payment by two notes." Then the case would have fallen within the case of Arnold v. Delano, 4 Cush. 33, 34, 50 Am. Dec. 754. See, also, Seymour v. Newton, 105 Mass. 272, 273.

Judgment for the plaintiff.

The Right of Stoppage in Transitu can be defeated only by an actual delivery of the goods to the consignee or some one for him, or by an assignment of the bill of lading to a bona fide purchaser: Branan v. Atlanta etc. R. R. Co., 108 Ga. 70, 75 Am. St. Rep. 26, 33 S. E. 836; Harris v. Tenney, 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82; Ocean Steamship Co. v. Ehrlich, 88 Ga. 502, 30 Am. St. Rep. 164, 14 S. E. 707; extended note to Sangslaff v. Stix, 60 Am. Rep. 51, 54. The right may be exercised where the goods have arrived at their destination, the consignee has not paid the freight after notice, and the goods remain in the custody of the carrier, without any agreement that the latter shall hold them as agent of the consignee: Wheeling etc. R. R. Co. v. Koontz, 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471; Jeffries v. Fitchburg R. R. Co., 93 Wis. 250, 57 Am. St. Rep. 919, 67 N. W. 424. And the right of stoppage in transitu is not affected by the vendor receiving the vendee's negotiable security for the purchase price: Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. Rep. 531, 29 N. E. 1124; monographic note to Hause v. Judson, 29 Am. Dec. 387, on the right of stoppage in transitu.

The Acceptance of Negotiable Paper as Payment is considered in Delaware etc. Ins. Co. v. Haser, 199 Pa. St. 17, 85 Am. St. Rep. 763, 48 Atl. 694; monographic note to Meyer v. Green, 99 Am. St. Rep. 846-851.

SEAVER v. BRADLEY.

[179 Mass. 329, 60 N. E. 795.]

ELEVATOR OWNER—LIABILITY AS CARRIER.—One who maintains a passenger elevator in an office building is not a common carrier within a statute giving a remedy for loss of life through the negligence of "common carriers of passengers." (p. 384.)

Tort, under Public Statutes, chapter 73, section 6, to recover for the death of the plaintiff's intestate through the negligence of the defendant, who owned and managed a building as trustee, in which was operated an elevator. In his opening statement to the jury, the plaintiff's counsel stated that he proposed to show that the building was an office building; that the defendant maintained therein an elevator for the use of the tenants, their employés, and visitors; that the decedent worked for one of the tenants; and that while being carried up in the elevator to his place of business, he was killed through the negligence of the defendant's servant or agent in operating the elevator, and through the defendant allowing the elevator to get out of repair and to so remain. At the conclusion of the opening statement, the plaintiff's counsel, in reply to the judge's question as to whether he contended a recovery could be had if the defendant was held not to be common carrier, answered that unless the defendant was held to be a common carrier, at least as to the decedent, he could not recover. Whereupon the judge ruled that the defendant was not a common carrier of passengers, and directed the jury to render a verdict for the defendant. The jury returned such a verdict, and the plaintiff alleged exceptions.

J. E. Young and F. J. Daggett, for the plaintiff.

J. Lowell and J. A. Lowell, for the defendant.

330 HOLMES, C. J. Those who maintain a passenger elevator in an office building are not "common carriers of passengers" within the meaning of Public Statutes, chapter 73, section 6. We assume that that section is not prevented from applying because it represents a statute passed before such elevators were in familiar use. But the words do not describe the owners of an elevator. The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of

goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let.

331 The only question before us is the meaning of words. Therefore, decisions that the liability of people in the defendant's position is not less than that of railroad companies do not go far enough to make out the plaintiff's case.

Exceptions overruled.

The Liability of the Owners of Elevators used for passengers or employés is considered in Griffen v. Manice, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925; monographic note to Southern etc. Loan Assn. v. Dawson, 56 Am. St. Rep. 806-810. Persons operating such elevators are generally considered common carriers of passengers: Springer v. Ford, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; Southern Bldg. etc. Assn. v. Dawson, 97 Tenn. 367, 56 Am. St. Rep. 804, 37 S. W. 86; Goodsell v. Taylor, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873; Treadwell v. Whittier, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 266.

SCOLLANS v. ROLLINS.

[179 Mass. 346, 60 N. E. 983.]

BAILMENT.—IF THE OWNER OF A CITY BOND, having on its back an assignment in blank executed by its former owner, intrusts it to another for safekeeping in a city where there is a usage to treat bonds so indorsed as the property of the bearer, he does so charged with notice of the power to deceive which he is putting in that other's hands, and if deception follows he must bear the burden. (pp. 387, 388.)

CONVERSION OF BOND BY BAILEE—BONA FIDE PURCHASER.—If the owner of a bond hands it to a stock broker for safekeeping, and the broker places it in an envelope upon which is the owner's name and words "Private property," and also places therein at the owner's request an insurance policy, and seals the envelope in the presence of the owner and places it in the safe, this does not show an intrusting of the bond to the broker, but a bailment of the envelope under seal. Hence, if the broker pledges the bond for his own debt, and it comes to a bona fide purchaser, the owner is not estopped to assert title. (p. 390.)

INTEREST.—ONE RECOVERING A JUDGMENT for the conversion of bonds is entitled to the ordinary rate of interest thereon from the date of the writ. (p. 391.)

Actions for conversion of certificates of indebtedness of the city of Boston. The testimony of the plaintiff showed that he spoke to one Gage, of the firm of Gage & Felton, employed by the plaintiff as brokers, saying that he should like to leave the bonds in the firm's safe for safekeeping until he should want to use them; that Gage consented and asked for the bonds, and the plaintiff handed them to him, and Gage went into the next room where the safe was, returning in a short time with an envelope on which was written the plaintiff's name, and the words "Private Property"; that Gage then placed the bonds in the envelope and was about to seal it, when the plaintiff handed him an insurance policy and asked him to place that in the envelope also; and that Gage did this, sealed the envelope in the plaintiff's presence, and carried it into the vault in which the safe was. The court held that this did not constitute an intrusting of the bonds. Gage and Felton pledged the bonds for their own debt, and they came into the hands of the defendant as a bona fide purchaser. The other material facts are stated in the opinion of the court. The defendant asked for a ruling that, if the jury found for the plaintiff, the measure of damages was the market value of the securities at the time of the alleged conversion, with interest from that time at four per cent per annum. This the judge refused to

give. The judge charged the jury that, if they believed the plaintiff's story and found that the bonds had been given to Gage, or to Gage and Felton, for safekeeping, they must find for the plaintiff; but if they found that the bonds were given as collateral security for the plaintiff's account, they must find for the defendant. He also instructed the jury that, if they found for the plaintiff, they should return a verdict for the value of the bonds at the time of the alleged conversion, with interest at six per cent from the date of the writ. The jury found for the plaintiff, and the defendant alleged exceptions.

A. Hemenway and R. F. Sturgis, for the defendant.

J. E. Hannigan and W. Wilson, for the plaintiff.

[351] HOLMES, C. J. These are actions for the conversion of two certificates of indebtedness of the city of Boston, payable to William Scollans, and transferable only at the office of the city treasurer. On the back of each was an assignment in blank, executed and acknowledged by William Scollans (see Public Statutes, chapter 77, section 6), by virtue of which, coupled with a delivery of the instruments, the plaintiff became the owner. On the most favorable evidence for the plaintiff, as we must take the case, the plaintiff went to one Gage, of the firm of Gage and Felton, bankers and brokers, and said that he would like to leave the certificates in the firm's safekeeping. Gage consented and asked for the certificates, and the plaintiff handed them to him. [352] Gage went into the next room where the safe was, and returned in a short time with a large envelope, upon which was written the plaintiff's name and the words "private property." Gage then put the certificates into the envelope, sealed it, and carried it into the safe. Later the certificates were pledged by Gage and Felton for their debt, and were sold at auction in due course by the pledgee, and bought in the usual course and in good faith by the defendant. The case already has been before the court: Scollans v. Rollins, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863. The difference between its present aspect and that upon which the court has passed is that at this trial evidence was offered, in accordance with an intimation in Scollans v. Rollins, 173 Mass. 279, 73 Am. St. Rep. 284, 53 N. E. 863, of the usage of those engaged in the business of buying and selling such securities, which was intended to show that by their general understanding and practice such

an indorsement in blank enabled the bearer to give a good title to a bona fide purchaser. The court ruled, however, that the only question for the jury to consider was another issue, which now is immaterial, as the jury found for the plaintiff upon it, and the defendant excepted.

A blank indorsement of such an instrument signifies that some person is expected to have the right to fill in the blank. On its face it does not indicate who that person is. By itself it is ambiguous. If, however, the general understanding of all concerned gives it a certain meaning, then it has that meaning by the same convention that gives a certain meaning to spoken or written words. The combination of words and blank is a sign as truly as a completed sentence—a sign which conveys an idea as definitely as if the word "bearer" had been written in. The extent to which the owner shall be estopped by permitting the sign to remain upon the instrument in that form may be enlarged or limited by considerations of policy more or less articulate. No doubt, if such an instrument were stolen from the owner and indorser before his indorsement had become effective by a transfer, or before the instrument had been put into other hands, even a bona fide purchaser would not get a title, and a different rule would be applied from that which is established in the interest of the currency with regard to bank notes used as money, and which might be extended to other bills and notes which are negotiable in the true sense: Knox [353] v. Eden Musee American Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988; 1 Morawetz on Corporations, 2d ed., sec. 190. See Wyer v. Dorchester etc. Bank, 11 Cush. 51, 59 Am. Dec. 137; Worcester County Bank v. Dorchester etc. Bank, 10 Cush. 488, 57 Am. Dec. 120; Wheeler v. Guild, 20 Pick. 545, 553, 32 Am. Dec. 231; Spooner v. Holmes, 102 Mass. 503, 508, 3 Am. Rep. 491. But if the owner of the instrument intrusts it to another, he does so charged with notice of the power to deceive which he is putting into that other's hands, and if deception follows, he must bear the burden: Colonial Bank v. Cady, 15 App. Cas. 267, 278, 285, 286; Jarvis v. Rogers, 13 Mass. 105, 15 Mass. 389; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Burton's Appeal, 93 Pa. St. 214; Pennsylvania R. R. Co.'s Appeal, 86 Pa. St. 80; Mount Holly etc. Turnpike Co. v. Ferree, 14 N. J. Eq. 117; National Safe Deposit etc. Co. v. Gray, 12 App. D. C. 276, 287; 1 Morawetz on Corporations, 2d ed., secs. 185-192. See White v. Duggan, 140 Mass. 18,

20, 45 Am. Rep. 437, 2 N. E. 110; Union Credit Bank v. Mersey Docks etc. Board, [1899] 2 Q. B. 205; Pence v. Arbuckle, 22 Minn. 417. In this case, as in some others, it cannot be said that the owner is free from all obligation to contemplate the possibility of wrongdoing by a third person: See Glynn v. Central R. R. Co., 175 Mass. 510, 511, 78 Am. St. Rep. 507, 56 N. E. 698.

There is nothing in the judgment delivered in Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, contrary to what we have said. The customary understanding as to the significance of an indorsement in blank could not relieve the taker from notice of a trust expressed on the face of the document, and of the consequence that the trustee had no power to pledge the instrument for his private debt. So very possibly in the case of an indorsment by the executor of a registered holder: Colonial Bank v. Cady, 15 App. Cas. 267. But see Wood's Appeal, 92 Pa. St. 379, 37 Am. Rep. 694. Or by a guardian: O'Herron v. Gray, 168 Mass. 573, 60 Am. St. Rep. 411, 47 N. E. 429. Perhaps it may be as well to add that the usage supposed does not create a new class of negotiable instruments or attempt to enlarge the city of Boston's promise, as was attempted in Partridge v. Bank of England, 9 Q. B. 396. It simply fixes the meaning of an ambiguous expression, for the purpose of determining whether it is open to the former owner to deny that the property in the paper and the equitable benefit of the promise have passed to another.

It follows from what we have said that if there was evidence 354 in this case that the plaintiff intrusted the instruments to Gage, and if there was evidence from which the jury would have been warranted in finding the supposed usage proved, the case should have been left to them upon those issues also, and the defendant's exceptions must be sustained.

There was evidence of the alleged usage. Witnesses testified that certificates indorsed as these were "would be regarded as bearer's certificate passing by delivery from hand to hand"; that they "would be regarded as bearer's property the same as a coupon bond"; that they "were considered negotiable." It is true that on cross-examination the witnesses admitted that if an unknown person came in with such instruments for sale they should take some measures to find out that they were dealing with a responsible man, but, apart from the fact that it always is for the jury to decide how far an absolute state-

ment on direct examination shall be cut down by any qualification or contradiction elicited by the other side (Purple v. Greenfield, 138 Mass. 1, 7), the jury would have been warranted in regarding these admissions as simply expressing the natural caution of respectable business men who wished to avoid the possibility of question or of having anything to do with a questionable affair: See First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280, 284, 21 Am. St. Rep. 450, 24 N. E. 44; Hinckley v. Union Pacific R. R. Co., 129 Mass. 52, 58, 37 Am. Rep. 297, citing Miller v. Race, 1 Burr. 452; also 2 Thompson on Corporations, sec. 2589.

But my brethren are of opinion that there was no evidence that the instruments were intrusted to Gage. It may be assumed that a delivery of possession for custody is a sufficient intrusting: See Hatfield v. Phillips, 12 Clark & F. 343, 360; 14 Mees. & W. 665, 670. On the other hand if the certificates had been handed to him in a sealed envelope, they would not have been intrusted to him, and opening the envelope would have been like a carrier's breaking bulk. The modern decisions have followed the ancient suggestion that in such cases there is no delivery of the contents of the inclosure: Choke in Year Book, 13 Edward IV, 9, pl. 5; 3 Inst. 107; 1 Hale's Pleas of the Crown, 504, 505; Belknap v. National Bank of North America, 100 Mass. 376, 381, 97 Am. Dec. 105. My brethren consider that the bailment to Gage in the form which it finally took was a bailment of the envelope under seal. In their opinion the transaction cannot be divided, and it does [355] not matter in what form it began. It was not complete until the plaintiff saw the envelope sealed, after having asked Gage to put an insurance policy into the envelope with the bonds, thus showing that he contemplated and assented to the sealing up which he saw was about to take place. They think it plain that after the plaintiff had seen the envelope sealed and placed in the safe and had departed, Gage would not have been at liberty to open the envelope, if, for instance, he found it more convenient for safekeeping to put the bonds away uninclosed. I have not been able to bring my mind to think that the jury were not at liberty to take a different view, but upon that point I stand alone.

An exception was taken to the admission of the checks made by Gage and Felton payable to the order of Scollans. By way of contradicting the defendant's evidence that the plaintiff's account with Gage and Felton was short, and that these in-

struments were delivered to him as security, the plaintiff testified that he lent them money on one or two occasions, which was repaid by their checks. These checks were dated in August, a month when by the defendant's evidence the plaintiff was heavily indebted to Gage and Felton. They tended as far as they went to corroborate the plaintiff's case, and were admissible as against a merely general objection.

We see no reason for not allowing the ordinary rate of interest after the plaintiff acquired a claim for money against the defendant.

Exceptions overruled.

A Bailee Converting a Certificate of Stock is answerable therefor: Hubbell v. Blandy, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502. And the sale of property by a bailee to an innocent purchaser does not devest the title of the bailor: Miller Piano Co. v. Parker, 155 Pa. St. 208, 35 Am. St. Rep. 873, 26 Atl. 303. So the true owner of a non-negotiable instrument is not estopped from asserting his ownership, where the instrument has been assigned by a blank indorsement on the back, and has been intrusted to another for safekeeping only, in the absence of evidence showing a custom for such instruments to pass from hand to hand like negotiable instruments: Scollans v. Rollins, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863. But see Moore v. Moore, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673.

FRAZEE v. NELSON.

[179 Mass. 456, 61 N. E. 40.]

EJECTMENT—SECONDARY EVIDENCE.—In an action to recover real property, copies of a writ and execution and the officer's return thereon are admissible to show the demandant's title. (p. 393.)

EJECTMENT—PROOF OF TITLE OBTAINED BY EXECUTION SALE.—If the demandant in an action to recover real property claims title under an execution sale, he must prove a valid judgment. The recital of the judgment in the execution is not the best or proper evidence thereof as against a tenant who is a stranger to the execution proceedings. (p. 393.)

SECONDARY EVIDENCE.—A COPY FROM THE REGISTRY OF DEEDS is sufficient evidence of the execution of the deed of which it is a copy. (p. 394.)

BANKRUPTCY—LIENS.—THE EFFECT OF THE BANKRUPTCY ACT OF 1898, section 67f, chapter 541, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee and those claiming under him, so that the property may pass to and be distributed by him amongst the creditors of the bankrupt. (p. 394.)

EXECUTION SALE.—IF THE OFFICER'S DEED at an execution sale conveys all the interest of the debtor "attached as afore-

said," whereas it does not appear from the return or deed that there was an attachment, the words quoted refer to the interest spoken of earlier in the deed as seized on execution. (p. 395.)

EXECUTION SALE—ENCUMBRANCES.—IT NEED NOT APPEAR in the officer's return or deed whether land sold under execution is free from, or subject to, encumbrances, when the sale is of all the debtor's right, title, and interest. (p. 395.)

EXECUTION SALE—ABANDONMENT OF PART OF LEVY.—If an execution is levied on several lots, but the levy is abandoned as to all except the one sold, the fact that notice of such abandonment was not given does not prejudice the debtor. (p. 395.)

EXECUTION SALE—ADJOURNMENT.—If an officer's return sets out that adjournments of an execution sale were made by direction of the plaintiff's attorney, this court cannot say that such adjournments were for "good cause." (p. 396.)

Writ of entry to recover certain real estate. There was a verdict for the demandants, and the tenant alleged exceptions. Section 67f, chapter 541, of the United States bankruptcy act of 1898, referred to in the opinion, is as follows: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

J. B. Dixon, for the tenant.

E. F. McClennen, for the defendants.

458 MORTON, J. This is a writ of entry to recover possession of certain premises in Reading. The plea is nul disseisin which admits the possession of the tenant and puts the demandants to proof of their title. The case is here on the

tenant's exceptions to various matters of evidence, and in regard to certain rulings that were asked for by him and refused, amongst which was one that the demandants had not made out a title and that a verdict be directed for the tenant. There was a verdict for the demandants.

The demandants claim title under a sale on an execution issued in their favor on a judgment obtained by them against one Dixon. The judgment was rendered December 27, 1897, 459 and the execution issued July 16, 1898, and was levied on the demanded premises on July 18th, and the premises were sold at auction to the demandants September 10th, after several adjournments, and a deed was duly executed and delivered to them by the sheriff.

The demandants must recover, if at all, on the strength of their own title, and not on the weakness of the tenant's title. They are bound to show whatever is necessary to make out a good title in themselves. At the trial they offered in evidence copies of the writ against Dixon, and of the execution and officer's return thereon. These were admitted subject to the tenant's exception. We think that they were rightly admitted: Chamberlin v. Ball, 15 Gray, 352. But there was no evidence of the judgment except that contained in the recital in the execution, and the tenant contends that, as the case stands, the title of the demandants is defective for want of proof of the judgment. The tenant is a stranger to the suit against Dixon. Proof that there was a valid judgment upon which the execution issued was a necessary link in the demandants' chain of title. Whatever might have been the case if the judgment debtor had been the tenant, we do not think that as against the present tenant the recital in the execution was sufficient proof of the judgment. It was not the best or the proper evidence of it, and for aught that appeared the judgment might have been vacated or set aside or might have been invalid for want of jurisdiction or for some other reason: See Doe v. Murlees, 6 Maule & S. 110; Hoffman v. Pitt, 5 Esp. 22, 23; Doe v. Smith, Holt N. P. 589, 2 Stark. 199; Fenwick v. Floyd, 1 Har. & G. 172; Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3193; 2 Greenleaf on Evidence, sec. 316; 3 Dane's Abridgment, 63. For this reason the exceptions must be sustained.

As some of the questions now raised may come up at another trial (if there should be one), we deem it proper to ex-

press our opinion on other matters to which the exceptions relate.

We think that the copies of the deeds, mortgages, and assignments were rightly admitted: Ward v. Fuller, 15 Pick. 185; Farwell v. Rogers, 99 Mass. 33; Gragg v. Learned, 109 Mass. 167. In this state a copy from the registry of deeds is sufficient evidence of the execution of the deed of which it is a copy: [460] Ward v. Fuller, 15 Pick. 185; Gragg v. Learned, 109 Mass. 167. The copy of the certificate of entry to foreclose comes within the rule as to the admission of deeds.

As original evidence it may be doubted whether the copy of the plan was admissible; but it is suggested that it was used to show the general location of the premises. If so, that was a matter within the discretion of the presiding judge: Paine v. Woods, 108 Mass. 160.

This is not an action between the demandants and the trustee in bankruptcy of Dixon or anyone claiming under the trustee, and the evidence that was offered of Dixon's insolvency at the time of the levy and of his subsequent adjudication as a bankrupt within four months thereafter was immaterial. The effect of section 67f of the United States bankruptcy act of July 1, 1898, chapter 541, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, so that the property may pass to and be distributed by him amongst the creditors of the bankrupt: National Mechanics' etc. Bank v. Eagle Sugar Refinery, 109 Mass. 38, and cases cited.

It is true, as the tenant contends, that the burden is upon the demandants to show a compliance with the statute in regard to the levy and sale on execution in all respects necessary to render a title under the levy good, and that such compliance must appear from the officer's return and cannot be shown by evidence aliunde: Parker v. Abbott, 130 Mass. 25; Haskell v. Variana, 111 Mass. 84; Litchfield v. Cudworth, 15 Pick. 23. The tenant points out various particulars in which he contends that the return fails to show that the statute has been followed, and he insists that the levy and sale were therefore invalid: 1. The first objection relates more particularly to the deed given by the officer, and is that the conveyance was of "all the right, title, and interest which the said Jonathan B. Dixon had at the time when the same was attached as

aforesaid," whereas neither in the return nor in the deed does it appear that there was any attachment. But we think it plain that what is referred to in the language quoted is the right, title, and interest which is spoken of earlier in the deed as having been seized on execution. 2. The next objection is that it does not appear in the [461] return or deed whether the land was sold free from or subject to encumbrances. But the sale was of all the debtor's right, title, and interest, and our attention has not been called to any provision in the statute which requires a statement in the return or the deed that the property sold was free from or subject to encumbrances, and we know of none. 3. The tenant further objects that the return shows that the officer "levied on and sold six different parcels in Somerville, Medford, and Reading, but the deed shows that he conveyed only one of them." But it appears from the return that while the officer levied on different lots in the places named, he afterward, by direction of the plaintiffs' attorney, abandoned the levies on all the lots except one—the premises in suit—and the fair construction of the return is that the sale was of that lot and no more. The fact that no notice was given of the abandonment of the levy on some of the lots could not have operated to the prejudice of the debtor. More bidders rather than fewer would have been present in consequence of the failure to give such notice. 4. The mistake in regard to the second lot is an obvious one, and does not defeat the levy: Shove v. Dow, 13 Mass. 529. 5. The fair import of the return is that the officer made diligent search for the debtor within his precinct, but was unable to find him, or to find that he had any agent or attorney, or any abode last and usual or otherwise therein (Owen v. Neveau, 128 Mass. 427; Sawyer v. Harmon, 136 Mass. 414), and that he sent by mail, postage prepaid, written notice of the time and place of sale, together with a copy of the execution to the debtor at the address named. "Notice of said sale" means notice of the time and place of sale. It is not stated in the return that the debtor resided at the street and number named. But the debtor was described in the execution "as of and having his usual place of business in Boston," and the place to which the notice was sent was in Boston: Pub. Stats., c. 172, sec. 46. Without passing upon the question whether the addition of the street and number and particular district would invalidate what otherwise probably would have been a good notice, it is sufficient, we think,

to observe that the return can be amended by stating, if that was the fact, that the debtor resided at the street and number given in South Boston, and the objection avoided. The objection is [462] of the most technical character as the return shows that the debtor was present at the time and place appointed for the sale and at the successive adjournments thereof. The tenant being a stranger to the proceedings under the execution, it is possible the instructions as to the effect to be given to the officer's return went too far. But no harm was done since the officer having returned that he was unable after diligent search to find the debtor in his precinct, or that he had any abode therein, it was immaterial whether the debtor in fact resided within his precinct or not: Owen v. Neveau, 128 Mass. 427. 6. The officer had power to adjourn the sale from time to time: Pub. Stats., c. 172, sec. 30. The return sets out that the adjournments were by direction of the plaintiff's attorney, and we cannot say that such an adjournment is not an adjournment for "good cause" within the meaning of the statute. It was not necessary that the officer should also return that he deemed the adjournments expedient: Ela v. Yeaw, 158 Mass. 190, 33 N. E. 511.

Exceptions sustained.

Bankruptcy.—For cases construing the bankruptcy act of 1898, see Turrentine v. Blackwood, 125 Ala. 436, 82 Am. St. Rep. 254, 28 South. 95; Stone v. Jenkins, 176 Mass. 544, 79 Am. St. Rep. 343, 57 N. E. 1002; Rosenthal v. Nove, 175 Mass. 559, 78 Am. St. Rep. 512, 56 N. E. 884; Harbaugh v. Costello, 184 Ill. 110, 75 Am. St. Rep. 147, 56 N. E. 363. An attachment of real estate is not dissolved by proceedings in bankruptcy begun by the defendant more than four months thereafter: Stickney etc. Coal Co. v. Goodwin, 95 Me. 246, 85 Am. St. Rep. 408, 49 Atl. 1039. See, also, Ferguson v. Greth, 195 Pa. St. 272, 78 Am. St. Rep. 812, 45 Atl. 735.

Evidence.—A transcript of a conveyance is admissible in evidence only when it appears that the original conveyance is lost or destroyed, or that the party offering the transcript has not the custody or control thereof: Burgess v. Blake, 128 Ala. 105, 86 Am. St. Rep. 78, 28 South. 968.

CADIGAN v. CRABTREE.

[179 Mass. 474, 61 N. E. 87.]

REAL ESTATE BROKER—DISMISSAL.—The owner of real estate has a right to dismiss a broker employed to procure a purchaser at any time before a customer is found. (p. 399.)

A BROKER IS NOT ENTITLED TO ANY COMPENSATION, no matter how much time he has devoted to finding a customer, provided a customer is not found. (p. 399.)

A BROKER IS NEVER ENTITLED TO RECOVER ON A QUANTUM MERUIT for work done, when he has not been successful in finding a customer for his principal. (p. 399.)

A BROKER EMPLOYED TO PROCURE A TENANT on terms fixed by the owner is not entitled to a commission, if he procures an offer from a tenant different from the terms so fixed by the owner, though such owner subsequently leases through another broker to the person who made such offer, and substantially on the terms of the offer made to and reported by the first broker. (p. 399.)

IF A BROKER EMPLOYED TO PROCURE A TENANT IS DISMISSED before a lease is consummated, but a tenant with whom he negotiated is subsequently accepted, he is not entitled to a commission, when he does not show that the tenant offered to him prior to his dismissal substantially the terms ultimately accepted. (pp. 403, 405.)

Contract by a real estate broker to recover commissions for negotiating a lease of certain property and procuring purchasers for the same and other property. Against the exception of the plaintiff the judge ordered a verdict on the fifth and sixth counts of the declaration, and against the exception of the defendant submitted the case to the jury on the third and fourth counts. The third count alleged that the defendant employed the plaintiff to procure a tenant for the property in question, and that the plaintiff at once undertook negotiations in her behalf for the leasing of the property, and that on or about January 1, 1899, he procured a tenant for the property at an agreed rental, but that the defendant wholly neglected and refused to carry out the agreement, and thereafter made a lease of the property to the same person through another real estate broker; and that the plaintiff thereby earned his commission upon the leasing of the property, which amounted to two thousand seven hundred and fifty dollars. The fourth count was upon an account annexed for two thousand seven hundred and fifty dollars as a commission upon the lease of the property, and for interest thereon from January 1, 1898, to the date of the writ. The fifth and sixth counts are suffi-

ciently stated in the opinion of the court. There was a verdict for the plaintiff in the sum of two thousand eight hundred and forty-seven dollars and thirty-eight cents. Both the plaintiff and the defendant alleged exceptions.

S. L. Whipple, for the plaintiff.

F. Paul, for the defendant.

[479] LORING, J. 1. The presiding justice was right in directing a verdict for the defendant on the fifth and sixth counts.

There was no evidence which would have warranted a verdict for the plaintiff. The most that could have been found in favor of the plaintiff was that the defendant employed him as a broker, in September, 1898, to find for her a purchaser for the Hotel Reynolds, and that it was then stated that he was the only broker in the matter. The plaintiff's employment in the matter was brought about by one Gilman the agent in Boston of the defendant, who did not live in that city. The plaintiff testified that Gilman "said that he thought that Miss Crabtree, from his conversation with her, would sell the property for $800,000. Under a suggestion that I ask $815,000, I started out." The plaintiff got several offers; one for $750,000 in cash, and another for $750,000, part in cash and part in "other property in trade." These offers were reported to the defendant personally between November 7th and November 11th of the same year and were refused. The defendant then fixed her price at $1,100,000, which the plaintiff testified "practically stopped the negotiations." On February 25, 1899, the defendant notified the plaintiff that she was willing to take $850,000 for the property; but on March 1st following she revoked the plaintiff's authority to sell the estate at all, and notified him that she had put the property in the hands of another broker for sale, to the exclusion of the plaintiff and everyone else.

[480] No sale of the property has been made. It appears that the defendant has paid the plaintiff the amount he was out of pocket in the matter.

The plaintiff's contention is that he is entitled to recover damages from the defendant for preventing him from earning a commission by finding a person who would buy the estate, and on the ground that he was entitled to a reasonable time in

which to find a customer and his authority to do so was revoked before that time had passed.

Until February 25th, when the defendant put a price upon the property, it is plain that the defendant could revoke the plaintiff's employment without coming under any liability to the plaintiff for so doing. We take February 25th as the date when a price was put upon the property, because the plaintiff's contention was that the price of $1,100,000 put upon the property in the early part of November could not seriously be regarded as a price that could be obtained for the property. Where the owner of property employs a broker to bring him an offer for the purchase of it, without naming a price at which he is willing to sell—that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him—there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer; in such a case, the owner has a right to reject every offer brought to him, as was held in Walker v. Tirrell, 101 Mass. 257, 3 Am. Rep. 352; and it is plain that under those circumstances he could decide not to accept any offer and to dismiss the broker altogether. But the right of an owner to put an end to the broker's employment is based on a consideration which goes deeper than that, and includes the case where a price is named by the owner at which he is willing to sell his property. That consideration is the nature of a brokerage commission; the very essence of a brokerage commission is that it is dependent upon success, and that it is in no way dependent upon, or affected by, the amount of work done by the broker. A brokerage commission is earned if the broker, without devoting much, or any, time to hunting up a customer, succeeds in procuring one; and it is equally true, on the other hand, not only that no commission is earned if a broker is not successful, but a [491] broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer, provided a customer is not found: See in this connection, Sibbald v. Bethlehem Iron Co., 83 N. Y. 376, 383, 38 Am. Rep. 415. The promise to pay a brokerage commission if a customer is found to purchase at a stated price is not the ordinary employment of labor but is more in the nature of an offer—namely, an offer to pay a commission if a person is produced who buys at the price named; and, like any other offer, it can be withdrawn at any time, without regard

to the fact that work has been done by a person in reliance on it, provided the work done has not brought the person within the terms of the offer. A broker who has not been successful in procuring a customer for his principal is never entitled to recover on a quantum meruit for work done. Where a broker has done work, but another broker has closed the trade, it was held that under the peculiar circumstances of Dowling v. Morrill, 165 Mass. 491, 43 N. E. 295, not that he could recover on a quantum meruit for work done, but that a commission was earned if his work was in fact the efficient and predominating cause of the sale; and so, where a customer is found to purchase property, but the trade is not made or is not carried through because the broker's principal is not able, or does not choose, to convey the property for which he employed the broker to find a purchaser, it is now settled that the broker's remedy is to sue his principal for a commission, and that in such an action he can recover his commission (see Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. 1000), and cases there cited); although at one time countenance was given to the proposition that in such a case the remedy of the broker was on a quantum meruit for work done: See Drury v. Newman, 99 Mass. 256, 258; also Walker v. Tirrell, 101 Mass. 257, 258, 3 Am. Rep. 352, citing with approval Prickett v. Badger, 1 Com. B., N. S., 296.

2. The defendant's exception to the refusal of the justice to direct a verdict for the defendant upon the fourth count must be sustained.

It appears that on or about November 2, 1898, the plaintiff was asked, as a broker, to find a tenant for the Hotel Reynolds, the property which he had been trying to sell for the defendant in the two previous months of September and October. The hotel was then under lease to one Reynolds, and that lease [482] apparently ran out on January 1, 1899. In the latter part of November the plaintiff brought the matter to the attention of Gould and Pollo. Gould and Pollo then suggested that they might take a lease at $25,000 a year, the hotel being put in running order at the expense of the lessor. This was rejected by the defendant. Later the plaintiff secured a proposal from one Mann to take a lease of the hotel; this was accepted by the defendant, and a lease was drawn up; this lease, however, fell through on December 20, 1898, for some reason not disclosed. The terms of this lease were $25,000 for the first five years and $30,000 for the next five years, the

lessor to lay out $35,000 in repairs and alterations and to receive six per cent interest on that expenditure. On December 22d or 23d, a few days after the negotiations for the Mann lease had fallen through, the plaintiff again approached Gould and Pollo on the subject, and they came to his office and saw there some plans of the hotel sent to the plaintiff's office by Mr. Gilman, the defendant's agent, for that purpose. We understand that these plans were plans showing the alterations to be made in the hotel under the Mann lease. Gould and Pollo were then told by the plaintiff what the terms of the Mann lease were. On December 29th, acting under instructions from the defendant, the defendant's agent, Gilman, directed the plaintiff to take down his sign, which was then hanging in the window of the hotel, as the defendant had decided to sell the property "if it took a year or even more than a year to do it." On January 2, 1899, the plaintiff called on the defendant at a hotel in Boston where she was then stopping, but "she said she was going away, and would do nothing about letting the Reynolds until she got back." She then left Boston and did not return until after the conclusion of the matters which gave rise to this litigation. On February 8th, she wrote the plaintiff that the hotel was "for sale only"; and there was evidence that this was in answer to an inquiry from the plaintiff about letting it. On March 3d the defendant notified the plaintiff in writing that she had decided not to sell the hotel, and had placed it in the hands of one Fitzpatrick to be let, and added that he was her "sole agent, and he only has authority to negotiate for me." On March 12th Fitzpatrick took Gould to New York, and in an interview then had between Gould and the defendant a lease [483] from the defendant to Gould and Pollo was agreed upon. This was a lease for ten years, the lessee paying $25,000 a year for the first five years, and $30,000 a year for the second five years, the lessor putting in the necessary plumbing and doing outside repairs. It appeared that the plumbing cost about $15,000, and that about $75,000 was voluntarily spent by Gould and Pollo, the lessees, in alterations and repairs.

The presiding justice instructed the jury that in order to recover the plaintiff must satisfy them that on January 2, 1899, when the defendant changed her mind and decided not to lease the hotel, the plaintiff had gone so far in his negotiations with Gould and Pollo that they had agreed to take a lease of the hotel on the terms of the Mann lease, and that

Miss Crabtree, on being told of that, had elected not to lease the hotel to them, and afterward had made substantially the same trade with them through another broker; but, on the other hand, if, on the 2d of January, when she notified him (the plaintiff) that she was not going any further with the thing—if, at that time, negotiations had not reached such a stage as to constitute an agreement on the part of Gould and Pollo to take that property on substantially the same terms on which it was afterward leased by her through the agency of Fitzpatrick, then the plaintiff has not made out his case, and he was not entitled to recover. In addition to this, the jury were distinctly told that if the plaintiff failed to get Gould and Pollo to take a lease, and afterward Fitzpatrick succeeded in procuring a lease from them, the plaintiff was not entitled to a commission.

We are of opinion that the Mann lease and the Gould and Pollo lease were not so far different one from the other as to prevent the plaintiff from recovering a commission if his services resulted in an offer from Gould and Pollo to take a lease on the terms of the Mann lease; we are also of opinion that, if the jury were satisfied that the plaintiff was the efficient cause of the lease to Gould and Pollo, they were justified in finding that the plaintiff's services brought the mind of the lessees to accept the terms finally agreed upon. Had there been any evidence to go to the jury that Gould and Pollo had agreed to take a lease of the hotel on the terms of the Mann lease prior to January 2d, there would have been no error in these instructions; [484] but we are of opinion that there was no evidence on which the jury were warranted in finding that the negotiations between the plaintiff and Gould and Pollo had gone so far as to result in an agreement on the part of Gould and Pollo to take the hotel on the terms of the Mann lease before January 2d.

Before disposing of this matter, we will deal with the rulings set forth in the twelfth and thirteenth requests made by the defendant. In those requests, the defendant asked the court to rule, in substance, that to recover on the third count the plaintiff had to prove that he procured an offer from Gould and Pollo in January to lease the hotel on terms fixed by the defendant, but that the defendant did not avail herself of that offer. This ruling the court refused to give, and instructed the jury that if the plaintiff procured an offer from Gould and Pollo to lease the hotel in January, and the defendant subse-

quently leased the hotel to them through another broker in March, on substantially the same terms, they might find that the plaintiff was the efficient cause of the lease which was made, and if they so found they might render a verdict for the plaintiff on the third count. This was wrong. The case stated in the third count is a different case from that put in by the plaintiff under the fourth count. The difference between the two cases is that in the first case the plaintiff was entitled to his commission on submitting the offer in January; in the second case, he was not entitled to a commission until the lease was made in March. The ground of recovery in the first case is that the broker procured a customer on the terms fixed by the defendant; in such a case, he earns a commission even though the defendant neglects to avail herself of the bargain which has been secured by the broker: Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. 1000. The ground of recovery in the second case is that the offer procured in January did not, of itself, entitle the plaintiff to a commission because the defendant had not then fixed the terms on which she would lease the hotel, and the commission was not earned until the defendant availed herself of the plaintiff's services by closing a trade through another broker in March, on substantially the terms of the January offer. The issues in the two cases are quite different. The presiding justice ruled that the plaintiff was not entitled to recover on either count unless he proved [485] that he was the efficient cause of the lease which was made in March. This was, in effect, a ruling that the plaintiff had not made out the case set forth in his third count.

We are of opinion that under the defendant's general request that there was no evidence to go to the jury on the fourth count, it is open to her to contend that even if it was not necessary for the plaintiff, in order to maintain the action set forth in that count, to prove that Gould and Pollo made an offer to take the hotel on the terms of the Mann lease (upon which we express no opinion), yet, inasmuch as the presiding justice ruled that unless the plaintiff proved that such an offer had been made, he had not made out his case, if there was no evidence that such an offer had been made, the defendant is entitled to have her general exception sustained.

On a fair construction of the testimony set forth in the bill of exceptions, the jury were not warranted in finding that such an offer had been made. On the direct examination, the plaintiff testified that "Mr. Gould was very anxious at the time

to hire the hotel." When asked by his own attorney as to what was said at that time, he testified: "They were ready to talk and do business; they came down and looked the plans over." The defendant's attorney at that point interrupted the plaintiff's examination with the question, "What did they say?" and the plaintiff answered, "They were ready to take the hotel, from what they talked with me. I told Miss Crabtree that I had talked with them, and that they were anxious to get the hotel. She said she was tired out and was going to New York, and would not do anything about it until she came back. That was about January 2, 1899." On cross-examination the plaintiff testified, in answer to the question, "Did you ever get any offer from Gould and Pollo for that property?" "No, because I gave them the terms at that time, the same terms given to Mann, and just at that time Miss Crabtree said she would not do anything about the property." He also testified on cross-examination that he never got from Gould and Pollo any offer, and never communicated to Miss Crabtree or to Mr. Gilman any offer from Gould and Pollo, and that "they always talked about hiring it on the same plan that Mann hired it on." This testimony falls short of proving an offer to take the hotel on [486] the terms of the Mann lease, and there is nothing in the rest of the cross-examination which brings this testimony up to being evidence of that fact. On redirect examination, the plaintiff testified: "I told her [Miss Crabtree] they were ready to hire on the same terms as the Mann lease."

On a fair construction of this testimony as a whole, we are of opinion that the jury were not warranted in finding that Gould and Pollo offered to take the hotel before January 2d on the terms of the Mann lease. The jury were justified in finding that the plaintiff told the defendant that Gould and Pollo were ready to take the hotel on those terms; but taking into account the refusal of the plaintiff to testify that any such offer was made, when he was asked on direct examination what was said by Gould and Pollo to him, and taking into account the explicit statement on cross-examination that no direct proposition was ever made by Gould and Pollo, we think that all the jury would have been justified in finding was that Gould and Pollo were believed by him to be ready to take the hotel on the terms of the Mann lease, but that they never said so and never made an offer to that effect.

Exceptions to the ruling on the fifth and sixth counts overruled; exception to the ruling on the fourth count sustained.

A Broker is not Entitled to Commissions unless he finds and produces to the vendor a purchaser who is ready, willing, and able to complete the purchase as proposed: Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134. But if he produces such a purchaser, and through the fault of the owner the sale is not consummated, his commission is due: McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229. And a broker is entitled to his commission if he is the procuring cause of negotiations which result in a sale, though the negotiations are conducted and concluded by the principal: Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882; or, if he finds a purchaser, but the business is taken out of his hands and given to another broker, who completes the purchase on the terms agreed upon: Gottschalk v. Jennings, 1 La. Ann. 5, 45 Am. Dec. 70. But, if two or more brokers have engaged in bringing about a sale, a recovery of commissions cannot be had by one who does not show that his services were the efficient means of bringing about the actual sale: Whitcomb v. Bacon, 170 Mass. 479, 64 Am. St. Rep. 317, 9 N. E. 742. For further authorities on this question, see the notes to Kalley v. Baker, 28 Am. St. Rep. 546-548; Ward v. Cobb, 12 Am. St. Rep. 589, 590; Walker v. Osgood, 98 Am. Dec. 171-178. For a dismissal of an agent and his recovery for services on the quantum meruit, see Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

STATE v. WEAVER.

[165 Mo. 1, 65 S. W. 308.]

HOMICIDE—THREATS OF ACCESSARY AS EVIDENCE. Declarations by a person jointly arrested and indicted with the accused for the murder of a police officer, made one year prior to the arrest, that he would get even with the police of the city in which the arrest was made, if it took twenty years, are inadmissible in evidence against the accused, in the absence of proof that the deceased was a policeman when the declarations were made, or that the accused knew that he was a policeman at any time, or that the accused took any part in the threats or declarations, or that any conspiracy existed to commit the homicide. (p. 407.)

HOMICIDE—EVIDENCE—ATTEMPT OF CO-INDICTEES TO BREAK JAIL.—If several persons are jointly indicted for a murder, it is error on the trial of one of them to admit evidence that his co-indictees had attempted to break jail, in which attempt he took no part, and it is also error to give an instruction relative to the attempt of the accused to break jail, founded on such evidence. (p. 408.)

CRIMINAL TRIALS—FAILURE TO TESTIFY.—The failure of the accused in a criminal trial to testify in his own behalf, or the failure of his codefendants to testify, does not raise a presumption of guilt against the person on trial. Hence, it is error to allow counsel for the prosecution to state to the jury that it is the duty of the codefendants of the accused on trial to come forward and testify as to their whereabouts at the time of the commission of the crime. (pp. 408, 415.)

E. W. Major, Dempsey & McGinnis, and J. E. Thompson, for the appellant.

E. C. Crow, attorney general, and P. S. Rader, for the state.

[5] SHERWOOD, P. J. This is a prosecution for murder, defendant being found guilty of murder in the second degree,

and sentenced to ten years in the penitentiary. The homicide occurred on the night of February 13, 1900. The person charged to have been killed was Lowell Pew, nightwatch in the city of Louisiana, Missouri, and he was shot and instantly killed at the "K" line depot in that city. There was a great deal of mystery connected with the killing of Pew. It is unnecessary at this time to go into the evidence to any considerable extent in passing upon those assignments which we deem necessary to notice.

Burns, Weaver and Logan were the three co-indictees in this case; and on severance had, Weaver alone was put on his trial. He had no means to employ counsel, and so the present counsel were appointed by the court to defend him as well as those who were indicted with him. These three persons were what is known as tramps, and when arrested no weapons of any kind were found upon them. Weaver had been tried once before, but the jury failed to agree. Then the trial of defendant again came on, some features of which will now receive comment.

1. A year or so before Pew was killed, Burns, Weaver, and Logan had been arrested in Louisiana on some trivial charge, and while confined there in the calaboose of that city Burns said "he would get even with the police of Louisiana if it took twenty years." This evidence of what Burns threatened to do was afterward, against defendant's objection and exception, admitted in evidence against Weaver when on trial for the murder of Pew, something which occurred over a year after the threat made, although it was not shown that Pew was a member of the police force at the time Burns made that threat, or that Weaver or Burns or Logan knew that Pew was a member of the police force at the time nor subsequently; and although Weaver took no part in the threats and gave them neither assent nor approval.

The only way in which such evidence could have been made relevant and admissible against defendant would have been to have introduced evidence to show that a conspiracy existed at the time Burns made his threat between Burns and Weaver to do to Pew, or, at any rate, to the policemen of Louisiana, the act charged in the indictment, or one of a similar nature. But there was no such conspiracy proved nor attempted to be proved: State v. May, 142 Mo. 152, 43 S. W. 637, and cases cited.

Of course, the nearness or remoteness of the threat would have nothing to do with its admissibility against the person [7] making it (State v. Grant, 79 Mo. 137, 49 Am. Rep. 218; Carver v. Huskey, 79 Mo. 510; State v. Adams, 76 Mo. 357); but because evidence of such threat was competent against Burns, the maker, it would be a most glaring and incomprehensible non sequitur to suppose that, therefore, it would be competent against Weaver. This point of the utter inadmissibility of the evidence aforesaid must be ruled in favor of defendant.

2. In the attempt to break jail, while confined in the jail at Bowling Green awaiting trial, the evidence is clear and beyond dispute that although Burns and Logan participated in that attempt, yet that Weaver had neither part nor lot in that matter. But no objection or exception was taken by defendant, nor did he move to exclude such testimony, conceding it to have been inadvertently admitted. The court afterward, of its own motion, gave an instruction relative to defendant's attempt to break jail. This instruction was plainly erroneous as having no evidential basis on which to rest; no exception, however, was saved to the giving of this instruction, and so its giving constitutes no reversible error.

3. The chief ground of complaint made in this court is the improper remarks made by counsel for the state when addressing the jury. These remarks were as follows:

Mr. Eugene Pearson, special counsel for the state, in his argument to the jury, said:

"And the question comes right here as to where these parties were on the evening of this murder and where they were after it, and the question for them to answer to this jury is why Edward Burns and Richard Logan did not enter that witness-stand and testify and tell where and how they were—

"By Mr. Major.—We object.

"Mr. Pearson.—It was their right and their duty—

"Mr. Major.—We object to the remarks as made by the counsel, for the reason that Edward Burns and Richard Logan stand jointly indicted with Edward Weaver and they are not on trial, and he has no right to comment on the fact that Edward [8] Burns and Richard Logan did not take the stand.

"By the Court.—The objection is overruled.

"Defendant excepts to the ruling of the court and saves his exceptions.

"By Mr. Pearson.—For they could enter the witness-stand and under the form of an oath give to the jury any evidence to let them know where they were, or calling out the testimony that they were in and around this murder at the time. I will tell you, sir, it is their duty, it is their right, they owe it to themselves, they owe it to the state and they owe it to this county to explain the circumstances under which they were seen on that evening. I will tell you, sir, that when they stand charged with being accessaries, or in company with one who is charged with a murder, this foul murder of an officer of the land, it is these two men's duty to clear away the cloud and give you the truth, and if they guard the silence, that's the greatest witness, the silent monster that tells them to keep still, I say if they give that silent testimony in that way, they convict themselves as being there at that time with their friend and they are to be regarded in his company for whatever purpose the evidence may bring out.

"Edward Burns and Richard Logan had ample opportunity to prove an alibi, with the men that live in this land, this country which is thickly populated, it is no trouble to show where they have been and what they have been doing; if they had had friends in Lincoln, Illinois, where they said they had worked in the mines, it would have been an easy matter to have brought some one to plead in behalf of their necks, but Edward Burns and Richard Logan do not get on the witness-stand and testify, and Edward Burns and Richard Logan do not get on the witness-stand and testify as to breaking jail, and as this instruction asserts it is a circumstance that goes to the presumption of guilt.

"By Mr. Major.—I renew the objection, for the reason that Edward Burns and Richard Logan stand jointly indicted with the defendant Weaver and must in turn be tried, and their failing to go on the stand cannot be commented on by the attorney.

"By the Court.—The two parties mentioned are not on trial.

"Defendant excepts to the ruling of the court and saves his exceptions.

"By Mr. Pearson.—The fact sticks deep, when Edward Burns and Richard Logan did not get on the witness-stand, they are going to find it hard to get around and harder still to get around this instruction [reads instruction]. [Continuing.] In the absence of the testimony of Edward Burns and Richard Logan, in the absence of any qualifying circumstances, raises

a presumption of guilt, in the absence of qualifying circumstances, sir, in addition to all this accumulation of evidence we have brought in, in addition to scouring the country and bringing before you their reputation and what they have been, in addition to all that, we bring before the law that you should respect and follow, etc."

Mr. Ras Pearson, special counsel for the state, in his argument to the jury, said: "And yet they remain as silent as the tomb of ages; they never come to tell you where they were—

"By Mr. Major.—We object, he makes a remark that 'they' failed to come and testify and did not single out any two defendants.

"By Mr. Pearson.—The attorneys asserted an alibi and when we attorneys assert that they went down Third street and 'they,' the attorneys, were as silent as the tomb of the ages as to where they were—

"By the Court.—The rule should be applied strictly to Burns and Logan.

"By Mr. Pearson.—I have no reference whatever to the fact that this defendant was not placed on the stand, but they, I mean the counsel, made no effort to show where they were, [10] after we had shown them going down Third street, their defense being an alibi.

"By Mr. Major.—The attorneys certainly were not walking down Third street, and we object to the remark of counsel.

"By the Court.—I will say that the remark of Mr. Pearson was susceptible of the construction he places upon it—that is of Mr. Pearson, it is susceptible of the explanation he puts upon it.

"By Mr. Pearson.—With the explanation I put upon it, is my remark proper?

"By the Court.—You should confine yourself to the evidence and the rule.

"Mr. Pearson.—Gentlemen, they have sat here and heard the state prove where they were and carrying the pick and file up that railroad track, yet not one of them raises his voice to deny a single solitary bit of the evidence.

"Counsel for defendant objects to the remark of counsel, because he has not specified any individual, and excepts to the ruling of the court.

"By the Court.—I do not think the exception is well taken.

"Defendant excepts to the ruling of the court and saves his exceptions.

"Mr. Pearson.—Burns could be a witness, Logan could be a witness. If they were there, as Judge Thompson says they were, and ran when Pew came down the road, they could stand up here and tell you Judge Thompson was telling the truth, but Burns and Logan stand here with it hovering around and over their heads, with the appalling deed, the awful crime, the murder of a police officer in the city of Louisiana, yet they are willing to stand here silent and not say a word and address you gentlemen. Am I going too far when I say that they know better, because when they open their mouth again, the officers of Pike county might follow wherever their voice says they were and find out what Burns and Logan were doing there?"

[11] Mr. Emerson, prosecuting attorney of Pike county, in his argument to the jury said:

"The proof lies within the breast of Richard Logan and Edward Burns; they sat in the courthouse and were frequently pointed out by witnesses, and the law of this state is that Senator Majors had a right to put Burns and Logan on the witness-stand and let them tell where Weaver was this night and let them tell—

"By Mr. Major.—We object for the reason they stand on joint indictment, and Burns and Logan must afterward be tried, and the state had no right to put them on the stand.

"By the Court.—The court does not consider the objection well taken.

"Defendant excepts to the ruling of the court and saves his exceptions.

"By Mr. Emerson.—The court says the objection to my statement is not well taken, and I repeat that Richard Logan and Edward Burns may have been put on the stand and thrown a great deal of light on the question. They were not put on the stand; they are indicted for this crime, so it is in evidence. They sat and heard witnesses say they saw them in the vicinity of the crime the night it was committed; they heard witnesses say they had on certain kinds of coats and located them in that town. What are you going to say as to the reason they did not put themselves to testify on the stand, simply because their testimony would have implicated the party on trial? If it would have implicated him, take that as a circumstance in this case and put it in the balance on the side of the state and weigh it—

"Counsel for defendant objects for the reason assigned heretofore.

"By the Court.—The objection is overruled.

"Defendant excepts to the ruling of the court and saves his exceptions."

Our statute (Rev. Stats. 1899, sec. 2638) declares: "If the accused shall not avail himself or herself of [12] his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by the attorney in the case, nor be considered by the court or jury before whom the trial takes place."

This section, by its terms, applies only to husband and wife, but it was never intended to sanction the idea that therefore a prosecuting attorney is at liberty to say as he pleases and do as he pleases in regard to the failure of those indicted in the same indictment to testify at the trial of one of their number who has obtained a severance from them. In this case the prosecuting attorney and his associates were simply engaged in whipping Weaver over the shoulders of Burns and Logan, besides asserting what they knew, or ought to have known, was not the law. Burns and Logan, being not on trial and being codefendants of Weaver, could not have testified on behalf of the state against him: State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704.

Nor could they have testified on behalf of Weaver, except at the option of Weaver. So that by asserting that it was the duty of Burns and Logan to have come forward and testified at the trial of Weaver, where they were on the night in question, "to explain the circumstances under which they were seen on that evening," "to clear away the cloud and give you the truth," counsel for the state thereby asserted a startling proposition, to wit, that in a criminal prosecution it is the "duty" of the accused "to clear his skirts; to prove his innocence"; that in any event, and at all hazards, a solemn duty is imposed on the accused to go upon the witness-stand and testify, no matter whether the result of such testifying would be to incriminate him or not. Hitherto, it had been supposed that we had some constitutional provisions that were rather antagonistic to the theory above announced. Not only were the statements of associate counsel untrue about its being the "duty" of Burns and Logan to go forward and testify when

Weaver's trial was on, [13] but from that statement the jury could readily draw the obvious and inevitable inference that if it was the "duty" of Burns and Logan to go forward uninvited, and testify when Weaver was on trial, then, a fortiori, it was the "duty" of Weaver himself to testify; to prove his whereabouts on the fatal night; to prove his innocence; "to clear away the cloud and give the jury the truth." In this way, by an indirection, counsel were enabled to state that it was the "duty" of defendant to have testified, and thereby call attention to the fact that he had not testified, right in the teeth of the statute. That statute will no more tolerate indirect allusions and evasions than it will direct statements: State v. Moxley, 102 Mo. 393, 14 S. W. 969, 15 S. W. 556.

Not content with the broad and unfounded statements aforesaid, counsel essayed a bolder flight by saying: "The fact sticks deep, when Edward Burns and Richard Logan did not get on the witness-stand, they are going to find it hard to get around and harder still to get around this instruction [reads instruction]. [Continuing.] In the absence of the testimony of Edward Burns and Richard Logan, in the absence of any qualifying circumstances, raises a presumption of guilt."

This remark means, if it means anything, that the failure of Burns and Logan to get on the witness-stand and testify "raises a presumption of [defendant's] guilt."

Further along, another counsel for the state declared: "I have no reference whatever to the fact that this defendant was not placed on the stand." This statement was another clear and palpable violation of section 2638. If he did not refer, etc., what need had he to state it? It was simply an attempt on counsel's part to be

"Artful most, when least affecting art."

It was a covert method of doing what the statute says shall not be done at all. And if the failure of a defendant to testify in his own behalf is not allowed to raise a presumption of guilt [14] against him, then, by the stronger reason the failure of codefendants to testify, etc., should not raise a similar presumption against the party on trial.

Further on, the prosecuting attorney, not to be outstripped or outdone by either of the precedent speakers, said: "I repeat that Richard Logan and Edward Burns may have been put on the stand and thrown a great deal of light on the question. They were not put on the stand; they are indicted for this

crime, so it is in evidence. They sat and heard witnesses say they saw them in the vicinity of the crime the night it was committed; they heard witnesses say they had on certain kind of coats and located them in that town. What are you going to say as to the reason they did not put themselves to testify on the stand, simply because their testimony would have implicated the party on trial?"

This statement of the prosecuting officer was simply his testimony as to what the testimony of Burns and Logan would have been if put upon the witness-stand. Inasmuch as the circuit judge still declined to rebuke or restrain these unwarranted statements, of course they went to the jury as the truth. If the jury, at that juncture, were wavering between the innocence and guilt of defendant, these reiterated judicial approbations of unfounded declarations of what the law and what the facts were would have been sufficient to have turned the scale in favor of defendant's conviction: State v. Jaeger, 66 Mo. 173; State v. Rothschild, 68 Mo. 52.

State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135, has been cited as deciding that "comment on the failure of a codefendant to testify was not error." What was said by Mr. Hammond on the trial of that case was this: "The defense put in no evidence except to contradict Mr. Greene by Mr. Allen. Why are not the other defendants here to tell you all about this in behalf of this defendant? They know what occurred in the house, and they might have been put on the stand to testify in this case, and tell you what took place in the house." Commenting on this [15] language, its force, effect and meaning, this court said: "Of course, such codefendant when called would have the same right as any other witness to refuse to give testimony that might criminate himself, but this is his personal privilege, and has nothing to do with the question of the right of the defendant on trial to have his codefendant not on trial called to testify, to which right the statement was limited."

This language of Mr. Hammond was thus whittled down and frittered away as above set forth; but this whittling down process made the remarks meaningless. This is self-evident, and therefore requires no further comment, further than to say the ruling in that case on the point in hand simply dodged the issue; and that is what every lawyer will say who reads the opinion in that case.

In Michigan, however, upon a statute similar to our own, where the question arose about a codefendant testifying, and the lower court charged the jury that Mrs. Smith could not be subpoenaed and testify to her guilt, but the defendant might have subpoenaed her if he was innocent, and she was innocent, and have her swear to that fact; that he did not do this, and it was a circumstance against him. Commenting on this charge, the supreme court of Michigan said: "The judge declares the law to be that, in such a case, where one of the two is tried, it is his duty to call the other as a witness, and his neglect so to do will be taken as a circumstance against him. There is neither reason nor authority for this rule, and the error committed in giving these charges was seriously prejudicial to the rights of the defendant": People v. Hendrickson, 53 Mich. 525, 19 N. W. 169.

On these reasons and authorities aforesaid, Mathews' case should no longer be followed, and the judgment herein should be reversed and the cause remanded.

All concur.

The Failure of the Accused to take the witness-stand in a criminal trial is not a fact upon which unfavorable inferences are to be predicated: People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590.

The Declarations of an Accomplice made after the commission of the offense are evidence against him only, unless made in the presence of his partners in the crime: Hunter v. Commonwealth, 7 Gratt. 641, 56 Am. Dec. 121. But the declarations of one of several who have combined to commit a crime, made in furtherance of the common design, are the declarations of all: Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898. See, further, State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; People v. Dow, 64 Mich. 717, 8 Am. St. Rep. 873, 31 N. W. 597. As to the admissibility of threats of a codefendant, see the note to Walker v. State, 7 Am. St. Rep. 21.

DOYLE v. ROWLING.

[165 Mo. 231, 65 S. W. 315.]

DIVORCE—ESTATE BY CURTESY.—If a husband, who is tenant by the curtesy initiate, obtains a divorce for the fault of his wife, he thereby defeats his right of curtesy in her property. (pp. 416, 417.)

Boone & Lee, for the appellant.

Russell & Deal, for the respondent.

235 VALLIANT, J. This is an action in ejectment. Plaintiff claims an undivided one-twelfth in fee and a life estate as tenant by the curtesy in the rest. His fee in the one-twelfth is conceded, but his claim of estate by the curtesy is disputed.

The facts are these: In 1874 and 1878 plaintiff bought the lands in question, and paid for them with his own means, but took the deeds in his wife's name as grantee. The titles were fee simple. There were three children born of the marriage capable of inheriting. In February, 1881, he obtained a decree of divorce for the fault of his wife. After the divorce, the wife, or she who had been the wife, conveyed the land by deed to the three children of the marriage; defendant holds title under them. She died in 1890 leaving the plaintiff surviving. Plaintiff inherited a one-twelfth interest from one of his deceased children. The defendant holds the fee to eleven-twelfths.

The judgment of the circuit court was for the plaintiff for one-twelfth and the rents and profits appertaining thereto, and for the defendant for the rest. The plaintiff appeals.

The question of law which the case presents for decision is this: When a tenant by the curtesy initiate obtains a divorce for the fault of his wife, does his estate continue so that if she dies leaving him surviving the curtesy becomes consummate?

In deciding this question, we find it easier to defer to the weight of authorities than it is to be satisfied with the reason they give. In 9 American and English Encyclopedia of Law, second edition, 858, it is said: "When a marriage is dissolved the husband ceases to 236 have any interest in his wife's lands by the estate of curtesy, as this estate depends upon coverture and the death of the wife and does not arise upon the death of a

divorced wife." Then in a note the author cites the following cases in support of his text: Boykin v. Rain, 28 Ala. 332, 65 Am. Dec. 349; Wheeler v. Hotchkiss, 10 Conn. 225; Starr v. Pease, 8 Conn. 541; Townsend v. Griffin, 4 Harr. (Del.) 440; Howey v. Goings, 13 Ill. 95, 46 Am. Dec. 427; Doe v. Brown, 5 Blackf. 309; Hays v. Sanderson, 7 Bush, 489; Oldham v. Henderson, 5 Dana, 254; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Barber v. Root, 10 Mass. 260; Moran v. Somes, 154 Mass. 200, 28 N. E. 152; Dunham v. Dunham, 128 Mass. 34; Clark v. Slaughter, 38 Miss. 64; Schuster v. Schuster, 93 Mo. 438, 6 S. W. 259; Renwick v. Renwick, 10 Paige, 420; Davis v. Davis, 68 N. C. 180; Blaker v. Cooper, 7 Serg. & R. 503; McGrath v. Pennsylvania Co., 8 Phila. 113; Sellars v. Davis, 4 Yerg. 503; Burt v. Hurlburt, 16 Vt. 292; Gould v. Webster, 1 Tyler, 409; Mattocks v. Stearns, 9 Vt. 326; Porter v. Porter, 27 Gratt. 599.

The Missouri case cited (Schuster v. Schuster, 93 Mo. 438, 6 S. W. 259) does not answer the question we have before us, because in that case the divorce was granted at the suit of the wife for the husband's fault, and it was covered by our statute which declares that in case of divorce "the guilty party shall forfeit all rights and claims under and by virtue of the marriage": Rev. Stats. 1899, sec. 2929. But the majority of the courts referred to in the above list sustain the principle as stated in the text, and to the same effect and based on the same reason is another high authority on this subject: 2 Bishop on Marriage and Divorce, sec. 1644.

An estate by the curtesy is a common-law creation. A divorce a vinculo at common law was an annulment of the marriage for a cause that existed before the marriage was entered into; it declared the marriage void ab initio: Blackstone's Commentaries, 435. It left the parties, so far as their estates dependent on or arising out of the marriage was concerned, as [237] though no marriage had occurred. Therefore, we would have no difficulty in reaching the conclusion that a divorced husband at common law had no estate by the curtesy. But the difficulty arises in attempting to apply the consequences of a divorce, under the statute, to the common-law estate of curtesy. A divorce under the statute for a cause arising after the marriage, puts an end to the marital relation, but it does not relate back to the act of marriage and render it null. It recognizes the marriage as valid and recognizes that rights arise out of it. It is prospective only in its effect.

In a divorce at common law there were no marital property rights to be adjusted, for if the marriage was void from the beginning no property rights arose out of it, but in a divorce under the statute there are property rights to be affected, and the reasons that would lead us to a clear conclusion if we had only the common law to deal with are not so conclusive when we attempt to declare the effect of a statutory divorce on a common-law estate. It is said that there are four essentials to an estate by the curtesy: a valid marriage, seisin of the wife during coverture, birth of a child capable of inheriting, and death of the wife; and the argument is that inasmuch as she who was a wife is not a wife after the divorce, and not a wife when she dies, therefore, one of the essentials to the estate by the curtesy is missing. That argument runs through nearly all of the cases cited above that sustain the proposition that the husband forfeits his estate by the divorce. Whilst deferring to the weight of authority, we confess that we do not feel the force of that reasoning. It adheres too closely to the letter; it plays upon the word, it sticks in the bark. When the essentials to an estate by the curtesy were defined by Lord Coke, he did not have in his mind a modern statutory divorce; he addressed his definition to the marriage relation, its incidents and accidents, as contemplated by the common law; when he used the word "wife" in that connection it was descriptive of a woman in the bonds of a legal marriage which was not liable to be terminated on account of the misconduct 888 of herself or that of her husband. To apply the ancient definition to altered conditions would be equivalent to giving it a force its author never contemplated.

In 2 Bishop on Marriage and Divorce, section 705, it is said: "But this divorce puts an end to all rights depending on the marriage, and not actually vested; as dower in the wife, curtesy in the husband, and his right to reduce to possession her choses in action." What the law-writer there says is not entirely in accord with views heretofore expressed by this court, for he takes choses in action not reduced to possession out of the category of a husband's vested rights. We have held that a husband had, by the common law, such a vested right in his wife's choses in action as that the legislature could not, by an act subsequent to his marriage, destroy: Leete v. State Bank, 115 Mo. 194, 21 S. W. 788.

In Porter v. Porter, 27 Gratt. 599, the Virginia court, in a learned opinion by Anderson, J., discuss the effect of a divorce

on an estate by the curtesy, and show that the estate of a husband who is tenant by the curtesy initiate is an estate for life in his own right. Quoting from the old English authorities, the court point out the distinction between the estate of the husband in his wife's lands before issue born, when he held only in jure uxoris, and that which the law created for him after issue born, which he held by his own right, the one depending on the continuance of the marital relation, the other not; the one liable to be defeated by the act of the wife, the other only by that of the husband. The court in that case further say: "It is more accurate to say that the rights of property of the husband and wife are to be found where the dissolution of the marriage leaves them, than to say that they remain where the law of the marriage placed them." The conclusion of the court was: "But the divorce which breaks the bonds of matrimony, perpetually dissolves the marital relation between them, so that the man ceases forever to be the husband and the woman to be the wife, must necessarily defeat its consummation. It can never [339] be consummate by the death of the wife."

Lord Coke points out the essential difference in the estate of the husband in his wife's lands before issue born and his estate after that event, the one being that of tenant by right of his wife, she being the one to pay homage to the lord, and the other that of a tenant in his own right of a freehold estate: "And albeit the state be not consummate until the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes. First, after issue had, he shall doe homage alone, and is become tenant to the lord. And it is adjudged in 29 E. 3, that the tenant by the curtesie cannot claim by a devise, and waive the state of his tenancy by the curtesie, because, saith the books, the freehold commenced in him before the devise for the term of life": 1 Coke on Littleton, 30a. Blackstone calls it a vested estate. "As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the pares curtis, did homage to the lord, and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant": 2 Cooley's Blackstone's Commentaries, 126, 7. These and other authorities cited by the learned counsel for appellant sustain fully his position

that the husband had a vested freehold estate in his own right in the lands in suit. Upon that foundation the appellant bases the proposition that he does not forfeit his estate because another has done wrong. The only answer to that proposition is that the obtaining of the divorce was his own free act and deed, and if it has the effect to destroy his estate, it is not by forfeiture, but by relinquishment. Our statute above quoted declares that in case of divorce the guilty party "shall forfeit all rights and claims under and by virtue of the marriage," and from this it is argued by appellant that the rights of the innocent are to be preserved. But that does not follow. A divorce necessarily destroys rights which the 240 innocent party had during the marriage, and those rights are surrendered, or voluntarily sacrificed, to obtain the divorce. It is argued that to require the husband, under the circumstances of this case, to surrender his estate by the curtesy in order to obtain the divorce, would be to force him to continue the marriage relation under distressing circumstances in order to preserve the estate; to punish the innocent and reward the guilty. Divorce is a misfortune under any circumstances. It is permitted by law to an innocent party who chooses it rather than continue the greater misfortune. It is a choice between two calamitous conditions. The law does not hope to compensate the innocent party for the family relation destroyed by the conduct of the guilty one; the divorce is granted as affording some relief, but at best it entails suffering and sacrifice on the innocent. If, in view of all the consequences, the innocent party elects to obtain a divorce, he must be considered as voluntarily relinquishing rights inconsistent with the new condition, whether they be social or property rights. He is to be considered as having elected to stand where, in the language of the Virginia court, the dissolution of the marriage leaves him, rather than where the law of the marriage placed him: Porter v. Porter, 27 Gratt. 599.

Is an estate by the curtesy in a divorced wife's lands consistent with other legal rights that naturally arise, and with consequences that may lawfully arise out of the several marital ties? Suppose the divorced wife, still owning the land in fee, marry another man and have children capable of inheriting by her second marriage. Would her second husband become tenant by the curtesy initiate? And if she should die leaving her former husband and her second husband both surviving her, which of the two would be entitled to the estate for his

life by the curtesy? Their respective claims would be totally irreconcilable. When she marries the second time, her second husband takes her and what is hers as completely as if she had never been married before. It would be as inconsistent in the [241] former husband to claim a lingering interest in her property as it would be to claim a right to her society. The only way to adjust the rights of the parties to the conditions and consequences produced by the divorce is to hold that the party obtaining the divorce, however innocent, by accepting the condition, and in consideration of the amelioration it was hoped would be afforded by it, voluntarily surrendered whatever rights he or she had, whether vested or contingent, that arose out of the marriage and the marital relation, the exercise of which would be in conflict with the inevitable consequences of the severed relation. And this must be presumed to have been the intention of the legislature, since it is a natural result of the statute. Under this view of the law, a wife obtaining a divorce for the misconduct of her husband would forego her right to dower if the statute did not, as it does, expressly preserve it to her: Rev. Stats. 1899, sec. 2947. A conflict of estates might result from this section of the statute, because the divorced man might marry again and die leaving his former wife and second wife surviving; then both would be entitled to dower. But as dower is only of one-third, the conflict of estates would not be irreconcilable unless the man left more than three divorced wives or widows surviving, which event the legislature does not seem to have made provision for.

In Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, it is held that a husband who had obtained a divorce from his wife, presumably for her fault, did not lose his estate by the curtesy in her land. But that decision was founded on a statute of that state which declared that when a divorce was obtained for the fault of the husband, he should lose his estate by the curtesy, and the court construed that as meaning that he should lose it only when he was in fault. That court's interpretation of its own statute does not assist us in this inquiry.

In Tennessee it has been held that a purchaser at execution sale of a husband's estate of curtesy initiate acquires a [242] title that is not affected by the subsequent divorce of the parties: Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269; Gillespie v. Worford, 2 Cold. 632. In the first of those cases,

that court holds that, as between the former husband and wife, the divorce puts an end to the estate of curtesy, but as to the purchaser a different rule should prevail. Those cases sustain appellant's contention, but they are not in line with the majority of the decisions in other states on this subject.

The circuit court held that the plaintiff was not entitled to an estate by the curtesy in the lands in question, and its judgment is affirmed.

All concur.

A Decree of Divorce Terminates a husband's interest in his wife's estate: Boykin v. Rain, 28 Ala. 332, 65 Am. Dec. 349; Howey v. Goings, 13 Ill. 95, 54 Am. Dec. 427. Compare Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, and see McBreen v. McBreen, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766. So, a divorce bars a wife's claim of dower: Wood v. Wood, 59 Ark. 441, 43 Am. St. Rep. 42, 27 S. W. 641; Carr v. Carr, 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453. Compare Cleaf v. Burns, 118 N. Y. 549, 16 Am. St. Rep. 782, 28 N. E. 881.

STATE v. WARNER.

[165 Mo. 399, 65 S. W. 584.]

CONSTITUTIONAL LAW—PRESENCE OF ACCUSED—RIGHT TO CHALLENGE GRAND JURY.—A person in jail accused of a felony awaiting the action of the grand jury has a constitutional right to be present at the impaneling of such jury, and to make challenges thereto on any grounds he may deem proper, and such right cannot be narrowed nor abridged by statutory enactment. It is immaterial that the grounds of challenge which he intended to set up are afterward adjudged to be insufficient. (pp. 428, 432.)

CONSTITUTIONAL LAW.—IF CONSTITUTIONAL RIGHTS COME IN CONFLICT WITH STATUTES, the former tolls the latter, and if a constitutional right has no statute specially adapted to enforce it by its own inherent potency, it enforces itself. (p. 431.)

CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO BE PRESENT.—The constitutional right of a person accused of crime to be present at all criminal proceedings against him includes the right to be present when the grand jury before whom he is accused is impaneled for the purpose of challenging it, and cannot be confined to the right to be present at his trial and to challenge the petit jury. (p. 432.)

CONSTITUTIONAL LAW.—NO DISCRIMINATION IS MADE AGAINST NEGROES by the laws of Missouri, and they are afforded every protection to life and liberty which white persons have. (p. 433.)

CONSTITUTIONAL LAW—EFFECT OF ADJUDICATION OF NATIONAL QUESTION.—Whenever a national question is involved, the national constitution as construed by the supreme court of the United States is the supreme law of the land, and as such must be respected and obeyed by the state courts. (p. 433.)

E. Rosenberger & Son, for the appellant.

E. C. Crow, attorney general, for the state.

404 GANTT, J. At the May term of the circuit court of Montgomery county, the defendant was jointly indicted with his brother, John Warner, for a felonious assault, with malice aforethought. He was duly arraigned, pleaded not guilty, a severance was granted, and he was tried and convicted and sentenced to the penitentiary for a term of nine years. The indictment is as follows:

"STATE OF MISSOURI
vs.
FRED WARNER and JOHN WARNER.

"Charge: Assault with intent to kill.

"The grand jurors for the state of Missouri, within and for the body of the county of Montgomery, now here in court, duly impaneled, sworn and charged on their oaths, present and charge that Fred Warner and John Warner, late of the county of Montgomery and state aforesaid, on the twenty-fifth day of December, 1900, at and in the county of Montgomery, in the 405 state of Missouri, with force and arms in and upon George Thurmon, Howell Windsor, Herman Limberg, Thomas G. Collum, feloniously, willfully, on purpose and of their malice aforethought, did make an assault; and the said Fred Warner and John Warner with a certain deadly weapon, to wit, a double-barrel shotgun with gunpowder and leaden balls, which they, the said Fred Warner and John Warner, then and there had and held, did feloniously, willfully, on purpose, and of their malice aforethought, shoot off at, against, and upon the said George Thurmon, Howell Windsor, Herman Limberg and Thomas G. Cullum, then and there giving to the said George Thurmon, Howell Windsor, Herman Limberg and Thomas G. Collum, in and upon the body of them, the said George Thurmon, Howell Windsor, Herman Limberg, and Thomas G. Collum, with a double-barrel shotgun aforesaid, several wounds, with the intent then and there, them, the said George Thurmon, Howell Windsor, Herman Limberg, and Thomas G. Collum, feloniously, willfully, on purpose and of

their malice aforethought to kill and murder; against the peace and dignity of the state.

"W. B. M. COOK,
"Prosecuting Attorney.

"A true bill:
"C. PEARSON,
"Foreman of the Grand Jury."

The record, so far as necessary for the determination of the principal assignment of error, shows the following facts:

After the defendant shot Windsor, Limberg, and others on December 25, 1900, he was apprehended and held to answer the action of the grand jury of Montgomery county at the May term, 1901, of the circuit court of said county. That court met the sixth day of May, 1901. The defendant was in jail awaiting the action of the grand jury. On the seventh day of May, 1901, and before the special grand jury which had been ordered by the court and summoned by the sheriff was impaneled, charged and sworn, the defendant's counsel requested the [406] court to have the defendant brought from the jail into court so that he might be present in court and make such challenges to the grand jury in person as he might see fit, which request was by the court denied, to which action of the court defendant by his counsel then and there excepted.

On the same day, and before the special grand jury was impaneled, charged, and sworn, the defendant by his counsel filed his motion to quash the panel of the special grand jury which had been summoned by the sheriff, assigning as reasons therefor that he was a citizen of the state of Missouri, and of the United States of America, and was a person of color of African descent, commonly called a negro; that upon the oath of one Thomas G. Cullum, a white man of the Caucasian race, he stood charged with having maliciously and feloniously made an assault with an intent to kill the said Cullum and three other white men, and in default of bail had been committed to the jail of Montgomery county to await the action of the grand jury; that the sheriff of Montgomery county, who selected the special grand jury, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury, but, on the contrary, excluded from the list of persons to serve on said special grand jury all persons of color of African descent, more commonly called negroes, solely because of their race and color; that the grand jury was composed entirely of white persons, while all persons of color of

African descent, commonly called negroes, although constituing about one-eighth or twelve and one-half per cent of the population and legal voters of Montgomery county, and although otherwise qualified to act as grand jurors, were excluded from serving on any jury in the circuit court, which is a discrimination against defendant, such discrimination being a denial to him of the equal protection of the laws and the civil rights guaranteed him by the constitution and laws of the United States, all of which he was ready to verify, and read said motion to the court and requested leave of the court to introduce witnesses [407] and offered to introduce witnesses to sustain the allegations of said motion, but the court declined to hear any evidence in support of said motion, and thereupon overruled the same, to which action of the court defendant then and there excepted.

The grand jury was thereupon impaneled, charged, and sworn, and retired to consider their presentments, and afterward, on the ninth day of May, and during the said May term, the grand jury returned into the court the indictment hereinbefore set out, charging the defendant with a felonious assault with intent to kill Thomas G. Cullum and three others on December 25, 1900, at Montgomery county, Missouri. And afterward on the tenth day of May, 1901, and before arraignment and before pleading to said indictment, the defendant filed his motion to quash said indictment, which said motion is in words and figures as follows:

"STATE OF MISSOURI, Plaintiff,
vs.
JOHN WARNER and FRED WARNER, Defendants.

"In the Montgomery county, Missouri, circuit court, May term, 1901.

"Now come the defendants, John Warner and Fred Warner, again in their proper person and in open court, and before they plead to the indictment found against them by the present grand jury (having first objected to the impaneling, swearing, and charging of the grand jury, which request and objection was by the court overruled, and to which action of the court the defendants, through their counsel, then and there excepted), and inform the court that they are citizens of the state of Missouri and of the United States of America, and

that they are persons of color of African descent, known as negroes, and that in said indictment preferred against them they are charged with having made an assault with the intent to kill one Thomas C. McCullum et al. (all white men of the Caucasian race), at [408] the county of Montgomery and state of Missouri, on or about the twenty-fifth of December, 1900. The defendants now in open court, and in their proper persons and represented by counsel, move the court to quash, annul, and set aside said indictment, for the reason that the grand jury which found said indictment, and which was selected by the sheriff of Montgomery county, Missouri, was composed solely and exclusively of white men of the Caucasian race, excluding therefrom all persons of color or of African descent, known as negroes, and were excluded on the list of persons to serve on said grand jury on account of their race and color, although they constitute about one-eighth or twelve and one-half per cent of the population and legal voters of the county of Montgomery, and although otherwise qualified to act as such grand jurors, they were excluded therefrom, exclusively and solely on account of their race and color, and have been so excluded from so serving on any jury in this court, which is a discrimination against these defendants, and such discrimination is a denial to them of the equal protection of the laws and of their civil rights guaranteed them by the constitution and laws of the United States of America.

"For a second and further reason for quashing, annulling, and setting aside said indictment, defendants state that through their counsel they made the request that before said grand jury be impaneled, sworn, and charged to inquire into the accusation preferred against them, they be allowed to appear in court in person and make such challenges to the array as they might see fit. (Which request was by the court overruled, and to which action of the court the defendants, through their counsel, then and there excepted.) Defendants state that through said action of the court in overruling their said request, they were denied their civil rights guaranteed them by the laws and constitution of the state of Missouri and the laws and constitution of the United States of America.

"For a third and further reason for quashing, annulling, [409] and setting aside said indictment, they state that had the court permitted them to be present in person at the impaneling, swearing, and charging of the grand jury which returned this indictment, they would have challenged one Edward Hart,

Esq., of McKittrick, Missouri, where the alleged offense was committed; that he was thoroughly conversant with the facts at issue before he was summoned, impaneled, and sworn as a grand juror to inquire into the accusations against these defendants, and that in reality he is a witness in the case for the prosecution, and was unable and unwilling to investigate the charges preferred against these defendants in an impartial and unbiased manner.

"Defendants further state that the said Edward Hart, Esq., had formed and expressed an opinion as to their guilt, and that he had openly and publicly declared that they were guilty of the charges preferred against them before he was summoned, impaneled, and charged as a member of the present grand jury which returned the indictment to which they are required to plead. Defendants further state that none of the facts stated in this third reason for quashing, annulling, and setting aside said indictment were within the knowledge of their counsel, and hence they were unable to make timely objection.

"Defendants further state that they stand ready to verify all the allegations contained in this motion.

"JOHN WARNER.
"FRED WARNER.

"John Warner and Fred Warner make oath and say that the facts and allegations contained in the foregoing motion are true.

"JOHN WARNER.
"FRED WARNER.

"Subscribed and sworn to this tenth day of May, 1901. My commission will expire December 21, 1904.

"WILLIS R. ANDERSON,
"Notary Public."

410 And upon this motion, on the 11th of May, during the same term of court, evidence was introduced by defendant in support of said motion, and the same was overruled.

A similar motion was made to quash the panel of petit jurors. At the hearing of said motion it was admitted that the county court, in selecting the petit jury, did not place the name or names of any colored person or persons of African descent, known as "negroes," on the list of persons from which the present petit jury was selected. The motion to quash the

petit jury panel was overruled by the court, and defendant excepted.

And afterward, at the same term, the defendant was placed on trial and found guilty as charged in the indictment, and his sentence assessed at nine years in the penitentiary.

Afterward, in due time, he filed his motion for a new trial, in which he assigned as errors the refusal of the court to permit him to be brought into court to make his challenges to the panel of the grand jury, and refusing to hear evidence in support of his motion to quash the panel of grand jurors, and in overruling his motion to quash said panel. Because the court erred in overruling his motion to quash the indictment and refused proper evidence in support of said motion and in allowing the affidavit of Edward Hart to be read in evidence in said motion. Because the court overruled his motion to quash the panel of petit jurors. Because the grand jury was illegally constituted, in that the sheriff failed to place any negroes on said panel, and discriminated against defendant because of his race and color.

The court overruled said motion, and defendant excepted. A motion in arrest was filed in due time, in which all these grounds as to discrimination on account of race and color were again repeated. The court overruled said motion and defendant excepted. An appeal was granted and perfected and a bill [411] of exceptions, saving all said exceptions, was filed in the time allowed by the court.

When the circuit court of Montgomery county convened at its May term, 1901, the defendant was in jail, held to answer a charge of a felonious assault. A special grand jury had been ordered by the court, and summoned by the sheriff. Prior to the impaneling of this grand jury the defendant, by his counsel, requested the court to have defendant brought into court in order that he might be present and make such challenges to said grand jury in person as he might deem fit, which request the court refused, and this denial of this request is the first error assigned on this appeal.

Section 2487 of the Revised Statutes of 1899 provides: "Any person held to answer a criminal charge may object to the competency of anyone summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecutor, and has been summoned or bound in a recognizance as such; and if such ob-

jection be established, the person so challenged shall be set aside."

Section 2488 provides: "No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other cases than such as are specified in last section."

The twenty-second section of our Bill of Rights, constitution of Missouri, 1875, declares that: "In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." By section 2610 of the Revised Statutes of 1899, it is further provided that "no person indicted for a felony can be tried unless he be personally present during the trial."

These constitutional and statutory provisions have been before this court for construction on several occasions. In State v. Underwood, 57 Mo. 50, 51, it appeared that the defendant was present in court throughout the trial, and [412] after his conviction he filed a motion for a new trial. Whilst he was in jail the attention of counsel was called by the court to certain causes assigned for a new trial, and thereupon the prosecuting attorney suggested that the prisoner should be brought into court, but the court announced it would not be necessary, as no action would be taken on the motion at that time, but the court desired a reference to authorities. Authorities were read to the court, and counsel stated their views in the absence of the prisoner, and the matter went over until the next day, when, the prisoner being present in court, the motion was taken up and argument of counsel had and the motion overruled. It was held no violation of his right to be present.

In State v. Brown, 63 Mo. 438, the record did not show the presence of the accused at the hearing of his motion for a new trial, and this was urged as error, but this court held that the hearing of a motion for new trial was no part of the trial, but a subsequent proceeding in which the statute did not require his presence, and ruled the point against defendant.

But in State v. Hoffman, 78 Mo. 256, the defendant, by his counsel, requested to be present in court when his motion for new trial was passed on by the court, and his request was refused, and on appeal this court held such refusal was reversible error, saying: "The question here presented is a very different question from that which arose in Brown's case. Here the accused demanded his right, under the constitution, to be present, not at the trial in the technical narrow sense of the stat-

ute, as construed in the Brown case, for the constitution has no such restricted meaning, but to appear and defend throughout the proceeding against him, which is pending in the trial court until the determination of the cause by the rendition of a judgment. If the court could refuse to permit the accused to be present, with equal propriety it could exclude his counsel. The constitution does not declare that either may appear, but 'that the accused shall have the right to appear [413] and defend in person and by counsel.' He had the right to make suggestions to his counsel, or, if he desire, to argue the motion to the court."

In State v. Lewis, 80 Mo. 112, as it did not affirmatively appear that defendant was denied the privilege of being present, the objection was unavailing.

The language of the construction and Bill of Rights is not, shall have the right to be present "at his trial" for the offense charged, but "in criminal prosecutions" he shall have the right to appear and defend in person and by counsel. That the impaneling of a grand jury to consider the charge which a prisoner is held to answer is a most important step in "a criminal prosecution" will not be gainsaid, and section 2487 expressly authorizes the prisoner to challenge the array or the polls for certain causes. That his challenge may prove ineffectual does not detract one whit from his right to be present, view the array, and its members, in order to determine whether he will exercise his right to do so or not. In this case, the record discloses he made the request, and it was expressly denied. Section 22 of the Bill of Rights evinces a jealous solicitude for the rights of an accused person, and it is of the most supreme importance that these rights shall not be infringed by judicial construction.

In People v. Romero, 18 Cal. 89, this identical state of facts existed, and that court, presided over by Chief Justice Stephen J. Field, afterward justice of the supreme court of the United States, in an opinion of Judge Baldwin, said: "It seems to be an unquestionable right of the prisoner to challenge the grand jury, or any member on the impaneling of the jury, when he has been previously held to answer. We see no provision of the statute allowing a challenge after such impaneling, when the prisoner had been previously in the custody of the law. It is not right that the prisoner should be convicted under these circumstances. The effect of the denial of his legal privilege of challenge was to render the grand jury incompetent [414] to

sit on his case, just as if he stood before a petit jury and was refused the right to challenge any one or more of the panel." Under such circumstances, the court held the indictment was worthless—in other words, not a legal indictment, because not found by a body competent to act on the case, provided the prisoner applied for the leave or requested permission to appear and challenge the grand jury.

This error should reverse this case, unless on his subsequent motion to quash the indictment on the ground that the grand jury was illegally organized, a hearing was given him, and this cured the error.

Upon first blush we were somewhat inclined to hold that, if at some subsequent stage of the prosecution the constitutional right which had been denied when first demanded had been granted to defendant, it would cure the error, but upon investigation we find that the circuit court, on the hearing of the motion to quash, held that section 2488 of the Revised Statutes of 1899 allowed a challenge to the array upon two grounds only, to wit, that a member of the panel was the prosecutor or complainant against the defendant, or was a witness for the state, and had been summoned or bound in recognizance as such, and thereupon overruled that motion. So that, while the court heard the evidence as to discrimination against defendant on account of his race and color, it evidently construed the statute as limiting the right to challenge the array to the two statutory grounds specified in section 2477, whereas the defendant was invoking a right guaranteed to him by the fourteenth amendment to the constitution of the United States, and where the statute of the state comes in conflict with the constitution, either of the state or the United States, the latter necessarily controls. As was said in Ex parte Marmaduke, 91 Mo. 267, 60 Am. Rep. 250, 4 S. W. 106: "Whenever a constitutional right comes in contact with a statute, the former tolls the latter; and whenever a constitutional right, such as is now under discussion, has no statute specially adapted to enforce it, by its own inherent potency, [415] and leaning not on the adventitious aids of statutory regulation, it supplies the lack of statutory provisions and enforces itself." And so it was ruled in Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687, in a cause in which the statute of Texas, like our own, limited the grounds of challenge to the array to two causes only. So that the hearing on the motion to quash not only did not cure the error of denying defendant his right to be present, and make his chal-

lenge, but the ruling of the court accentuated the error in that it forever precluded the assertion of that right.

But independently of the subsequent proceedings, we hold that the denial of the right of the prisoner to be present and make any challenge he might have to the array on the polls of the special grand jury was a fundamental error. As said by the supreme court of California, it vitiated the indictment, not on account of its form, but for the far more important and controlling reason that it rendered that grand jury incompetent to sit on his case. His liberty could not be taken from him except on an indictment preferred by a duly constituted and organized grand jury, and one competent to inquire into his alleged offense. The same right exists to one held to answer a charge by a grand jury, to be present to challenge the array or the polls, as is vouchsafed to every defendant to be present and challenge the petit jury.

The right to be present in all criminal prosecutions includes the right to be present when the grand jury is impaneled, and cannot be confined, as was said by that able and eloquent lawyer, Mr. Uriel Wright, in State v. McO'Blenis, 24 Mo. 405, 69 Am. Dec. 435, "to the hour and place of actual peril, when liberty and life shall be in greatest jeopardy, when the accused shall stand before [a petit jury] a tribunal having power over either or both; but the words ['in criminal prosecutions'] are broad enough to cover the initiate prosecution, whenever and wherever it takes the matured form of a legal accusation of crime," and it has always been recognized that the accused has the right to be present when the grand jury, who alone can prefer [416] the indictment, is being impaneled and organized: 1 Burr's Trial, 38.

As already said, it is immaterial that after being brought before the court he may not deem it necessary to make any challenges, or that those he may make shall not be adjudged sufficient to set aside the array or any of the members of the jury; as this was denied him after an express request to be present, the judgment must be reversed and a new grand jury impaneled to consider the charge for which he is held.

We express no opinion as to the sufficiency of the proof to sustain the charge of discrimination against the prisoner in the selection of the grand and petit juries on account of his race and color.

Whatever our individual views as to the proper construction of the fourteenth amendment, the supreme court of the United

States has given its construction of that amendment as it affects the selection of grand jurors who are to make presentments of negroes charged with crime, and petit juries who are to finally pass upon such charges.

The laws of this state, in our opinion, make no discrimination against negroes, but afford them every protection to life and liberty which white men have. It will be time enough after another grand jury shall have been selected and constituted and an indictment preferred, and the defendant convicted, to determine whether, in the individual case, the grand jurors or the petit jury have been selected with a view to exclude therefrom citizens of African descent, or negroes, simply because of their race and color.

This question has been before the supreme court of the United States, and the courts of last resort in our sister states, on numerous occasions: Virginia v. Rives, 100 U. S. 313; Neal v. Delaware, 103 U. S. 370; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. Rep. 904; Smith v. Mississippi, 162 U. S. 592; 16 Sup. Ct. Rep. 900; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687; Whitney v. State (Tex. Cr.), 59 S. W. 895; Lewis v. State (Tex. Cr.), 59 S. W. 1116; Whitney v. State (Tex. Cr.), 63 S. W. 879; [417] Smith v. State (Tex. Cr.), 58 S. W. 97.

Wherever the federal question is involved, the constitution of the United States, as construed by the supreme court of the United States, is the supreme law of the land, and as such must be respected and obeyed, and we respectfully call the attention of the circuit and criminal courts to these decisions with a view to obviate objections like this now constantly being urged.

The judgment is reversed and the cause remanded for proceedings in accordance with the views herein expressed.

All concur.

State Courts are Bound by the decisions of the supreme court of the United States upon a question arising under the federal constitution: Fox v. State, 89 Md. 381, 73 Am. St. Rep. 193, 43 Atl. 775.

A Constitutional Provision is Self-operative where no legislation is necessary or could add to or take from it: State v. Caldwell, 50 La. Ann. 666, 69 Am. St. Rep. 465, 23 South. 869.

The Necessity for the Presence of the Accused in criminal proceedings is considered in the monographic notes to Warren v. State, 68 Am. Dec. 219-228; Fight v. State, 28 Am. Dec. 629-631. See, too, State v. Mannion, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542. A prisoner in felony cases has a right to be present at all times

during the course of his trial: State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185. But this rule does not apply to proceedings in the appellate court, having jurisdiction to review only errors of law: State v. Jacobs, 107 N. C. 772, 22 Am. St. Rep. 912, 11 S. E. 962; nor to a hearing on a motion to quash the indictment: State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021.

FARMERS' EXCHANGE BANK v. HAGELUKEN.

[165 Mo. 443, 65 S. W. 728.]

MARRIED WOMEN—CONVEYANCES BY.—Under statutes providing that real estate owned by a married woman shall be her separate property, and vesting her with power to transact business on her own account, and to contract as if she were a feme sole, she may convey the legal title to her property by trust deed without her husband joining therein. (pp. 434, 437.)

R. D. Cramer, L. Myers, and J. M. Jayne, for the appellants.

N. M. Pettingill, for the respondents.

445 SHERWOOD, P. J. This proceeding was instituted against Isabella Hageluken and her husband to foreclose a certain deed of trust, given to secure certain promissory notes in suit, which notes and deed were executed by Isabella while covert; her husband did not join in executing such deed, and upon this ground she resisted the suit of foreclosure, asserting that her husband did not join with her in the execution of the trust deed, and for this reason she was incompetent to convey the land mentioned in the deed aforesaid. The title to the land in suit accrued to Isabella in 1891, by reason of a conveyance to her in that year. At the close of the evidence on part of plaintiffs, defendants asked of the court a declaration of law in the nature of a demurrer to the evidence, and contending for the same point made in defendant Isabella's answer. All the evidence being closed, judgment went for plaintiffs, hence this appeal.

446 The record thus shows that the only dominant feature in this cause is whether Isabella, under statutes in existence at the time, was capable of making the litigated contract.

In Blair v. Chicago etc. R. R. Co., 89 Mo. 383, 1 S. W. 350, one of the main questions to be determined was whether a married woman could, without joining her husband, execute a valid release for personal injuries inflicted upon her. In deter-

mining this point, section 3296 of the married woman's act (Mo. Rev. Stats. 1879), was passed upon, the language of that section then being: "Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase, and profits thereof, be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife; provided, that said personal property shall not be deemed to have been reduced to possession by the husband by use, occupancy, care, or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber, or otherwise dispose of the same for his own use and benefits," etc. And upon the language thus employed, it was ruled that the words "her separate property and under her sole control" made her, so far as concerned the personal property and rights in action in that section mentioned, a feme sole, since it clothed her with the jus disponendi of that property, thereby making her sui juris with regard thereto; and this being the case, the release by the wife of personal injuries, though executed by her alone, was valid, and juncture of her husband unnecessary. This case has since met [447] with frequent approval: Brown v. Bowen, 90 Mo. 184, 2 S. W. 398; Broughton v. Brand, 94 Mo. 169, 7 S. W. 119; Gilliland v. Gilliland, 96 Mo. 522, 10 S. W. 139.

Subsequent to the ruling made in Blair's case, there have been several additions made to section 3296. Thus in 1883 (Laws 1883, p. 113) these words were added at the bottom of that section: "And any such married woman may, in her own name and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a feme sole; provided, any judgment for costs in any such proceeding rendered against any such married woman may be satisfied out of any

separate property of such married woman, subject to execution."

And in 1889, at the so-called revising session, at the beginning of section 3296, were added the words, "all real estate": Rev. Stats. 1889, sec. 6869. Not only did the legislature, at said revising session, make the addition just mentioned, that of including real estate among the property placed under a married woman's sole control and made her separate property, but further advancement at the same session was made in the same liberal direction, by the enactment of an entirely new section (section 6864), which reads as follows: "A married woman shall be deemed a feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; provided, a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption [448] and homestead rights for the protection of his own property."

If, under section 3296 as it originally stood, the personal property and rights in action became a married woman's separate property and under her sole control, and if as to such property she became a feme sole and could execute alone a valid release for injuries done her, it is difficult to see why larger and more comprehensive rights did not accrue to, and become hers, by reason of the broad provisions of section 6864, aforesaid. We hold that they did, and that under that section she had full power to contract with, and to deal with, strangers, or indeed with anyone else to the full extent of the property rights mentioned in that section, and such contracts when made were followed by such results as attend the contracts of all others. To hold otherwise would be to ignore the plain and broad language of that section, as well as to ignore the evident progress made in our legislation toward the ultimate emancipation of married women from the shackles by which she was fettered at common law, and by the final consummation for that purpose by the enactment of existing statutes.

The same view as to the effect of such statutes is maintained in other states which have enacted similar legislation. Thus, in Maine, the statute provided that: "The contracts of any

married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," etc. And upon this statute it was ruled that a married woman was bound as surety on a promissory note which she had signed with a stranger, Appleton, C. J., remarking: "The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general, and there can be no reasonable doubt as to its meaning": Mayo v. Hutchinson, 57 Me. 546.

Thus, in New York, Andrews, J., speaking for the court, said: "The statute of March 2, 1860 provides that a married woman may carry on any trade or business and perform [449] any labor or services on her sole and separate account, and that the earnings therefrom shall be her sole and separate property. The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. It cannot be supposed that the legislature, while conferring the power upon a married woman to enter into trade or business on her own account, intended that her common-law disability to bind herself by contract should continue as to contracts made in carrying on the business in which she was permitted to engage. The power to engage in business would be a barren and useless one, disconnected with the right to conduct it in the way and by the means usually employed": Frecking v. Rolland, 53 N. Y. 422.

These views are not in accord with those expressed in Brown v. Dressler, 125 Mo. 589, 29 S. W. 13, cited for affirmance of the judgment below. In that case, it was ruled that a married woman could not, under the provisions of section 6864, convey her land held by general warranty deed made to her in 1891, unless her husband joined in such conveyance; but still that, under that section, she could buy land and pledge it or give a lien on it, and that such a contract could be enforced in equity, as an equitable mortgage which the courts would enforce. In other words, that under the broad and comprehensive terms of section 6864, a married woman, although expressly empowered thereby to "carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party," yet after all only possessed a quasi right to contract to a limited extent just far enough to bind her land

in equity. And this upon the ground that the statute was in derogation of the common law, and, therefore, to be strictly construed; just as if the married woman's act, from its initial [450] statute clear through its progress of expansion and broadening emendations and revisions of fourteen years, was not always in derogation of the common law. This was its sole end, aim, and purpose.

The statute was designed to confer on a married woman the legal estate in her land in as full and complete manner and degree as if she were a feme sole. This is the view taken in Illinois of a statute which provided that such property "shall be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she were sole and unmarried," McAllister, J., remarking: "An estate so derived is no longer the mere creature of equity, dependent upon its power alone for protection, and its principles for the right of enjoyment; but, in all cases when, by the nature of the gift, bequest, devise, conveyance, or deed of settlement an absolute legal title would be vested in a feme sole, the same title would, under the statute, be vested in a feme covert, and the property be held, owned, possessed, and enjoyed by her the same as though she were sole and unmarried. When the estate is thus transformed from an equitable to a legal estate, all of the rights incident to it must be legal rights. So far as the statute goes, her disability and her husband's marital rights are alike swept away": Cookson v. Toale, 59 Ill. 515.

Bishop takes the same position and holds the same theory as to such statutes, saying: "Under the unwritten law, a married woman might hold property in ways which were well defined. If legislation then added to this law a statute, simply providing another way in which she might hold property, the presumption was, that, since she was still a wife, the law-making power meant it should be, in her hands, wife's property. As to it, in the same manner as to everything else, she would remain under the established restraints of coverture. But if the statute went further, and provided that the property should be hers in the same manner as though she were unmarried, this [451] further provision would directly negative the presumption, and make the woman a feme sole as respects this estate, both at law and in equity. Consequently, she could sell it, or enter into contracts regarding it, precisely the same as

though she were still unmarried. The author can perceive no way in which it is possible for this conclusion to be avoided."

If section 6864 confers a legal estate on a married woman, and if it gives her full power to contract and be contracted with, then the result of such a contract, if it take the form of a deed of conveyance, of necessity, must pass the legal title, and not create a mere pledge or equitable lien.

In Arnold v. Willis, 128 Mo. 145, 30 S. W. 517, it was held that a married woman, under the provisions of sections 6869 and 6864, could maintain ejectment in her own name. Of course, the sole basis of such maintenance of ejectment must be the possession of the legal title. To the like effect is Bains v. Bullock, 129 Mo. 117, 31 S. W. 342.

Being the possessor of the legal title, a married woman's deed must be as broad in its conveying power as that legal title and her capacity to "contract and be contracted with," and would consequently pass that legal title or it would pass nothing. To hold to the opposite of this would be to reject the plain meaning of the statutory words, to dwarf, cripple, and pervert that meaning in utter disregard of the whole history of our progressive legislation on the subject under discussion.

Instances have been cited in Brown v. Dressler, 125 Mo. 595, 29 S. W. 13, where an equitable lien has been created by an imperfect conveyance or contract to convey, following the familiar rule in equity: Adams' Equity, 8th ed., 121. But no instance can be found in the books, either of court-writer or text-writer, where such equitable lien was held to be created, where a transaction took place between a man or woman and third parties, unless the grantor in the attempted conveyance was sui juris, and had the power, without assistance, to make a valid conveyance. Such status of sui juris, and such power [452] to convey, are denied in the case under comment, and yet the power to create an equitable lien is asserted.

For these reasons we shall decline to follow the ruling in Brown v. Dressler, 125 Mo. 595, 29 S. W. 13, but, on the contrary, declare that Isabella received a full complete legal title by reason of the quitclaim deed made to her; and that she conveyed a title of like nature when she executed the deed of trust. And further that her husband was not a necessary party in this litigation.

Holding thus, we affirm the judgment.

All concur.

PER CURIAM. The foregoing opinion of Sherwood, J., in division two, is approved and adopted by the court in bank.

Burgess, C. J., Sherwood, Robinson, and Marshall, JJ., concur.

Brace, Valliant, and Gantt, JJ., dissent.

A Married Woman may Convey or encumber her separate estate without her husband joining in the conveyance: Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897; Richardson v. De Giverville, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; Williamson v. Yager, 91 Ky. 282, 34 Am. St. Rep. 184, 15 S. W. 660; Stacey v. Walter, 125 Ala. 291, 82 Am. St. Rep. 235, 28 South. 89. See the monographic note to Thomas v. Folwell, 30 Am. Dec. 233-241, on the power of a married woman over her separate estate.

YOUNG v. YOUNG.

[135 Mo. 624, 65 S. W. 1016.]

JUDGMENTS NUNC PRO TUNC can be entered only when there is something in the record which furnishes a basis to amend by. (p. 442.)

JUDGMENTS NUNC PRO TUNC cannot be entered upon parol evidence alone. (p. 442.)

JUDGMENTS NUNC PRO TUNC AFTER DEATH OF PARTY.—If, after the conclusion of the trial of an action for divorce, one of the parties thereto dies, and the court enters a decree nunc pro tunc with nothing in the papers on file nor in the record to look to as a basis for such entry, the decree is void. (p. 443.)

JUDGMENTS NUNC PRO TUNC AFTER DEATH OF PARTY.—Any recital made in a decree or judgment entered after the death of a party to the action cannot be self-serving to afford a basis for a nunc pro tunc entry. (p. 443.)

JUDGMENTS NUNC PRO TUNC.—An oral announcement by the court upon the conclusion of a trial as to what its decision will be, which can be proved only by parol evidence, is not a sufficient basis for a nunc pro tunc entry of judgment or decree. Nor does such oral announcement make the entry of the judgment a mere ministerial act not affecting the judicial determination of the case. (p. 444.)

JUDGMENTS—FINAL DECREE.—If findings of fact on any material matter involved in the case are left open for the future determination of the court, the decree is not final until that determination is included therein. (p. 445.)

T. M. Estes and D. Biggs, for the appellants.

Judson & Green, for the respondent.

[626] MARSHALL, J. This is an action for the partition of certain land in the city of St. Louis, being a part of the estate of Joseph B. McCullagh. The plaintiff claims as widow of Charles H. Young, who was a nephew of McCullagh. The controversy turns upon whether the plaintiff is the widow of Charles H. Young, and the determination of this question depends upon the proceedings in a suit for divorce in the courts of the state of California, wherein Charles H. Young was the plaintiff and Lulu Young, the plaintiff herein, was the defendant.

The record before this court shows the facts bearing upon the divorce case to be as follows: The trial of the divorce case was begun by the judge of the California court, a jury being waived, on August 23, 1897, and completed, and the case submitted on September 4, 1897, and thereupon the judge announced orally from the bench that he would grant a divorce to the plaintiff therein, Charles H. Young, but that owing to Young's ill-health, the custody of the child would be awarded to the mother, the defendant therein. A discussion then arose as to the amount to be paid by the father for the support of the child, and the judge said he would fix that in signing the findings. The defendant's counsel then asked for an allowance as attorney's fees. The plaintiff's counsel denied the power of the court to make any such allowance. The judge said he would fix that also when he signed the findings, and directed the attorneys for Young to prepare findings and submit them to him on the 7th of September. When the matter was again taken up on the 7th of September, it was suggested to the court that Young had died early that morning. The judge was of opinion, and Mrs. Young's attorneys contended, that the action abated by the death of Young. On the other hand, Young's [627] attorneys contended that the court had power to enter the divorce decree nunc pro tunc as of Sepetmber 4th. The matter was laid over for further argument until September 17th. Between the 7th and the 17th of September, Mrs. Young instructed her attorneys to make no further opposition to the decree being entered, as the will of Young had made suitable provisions for their child, and that was her principal object in contesting the divorce case.

The power of the court to enter a decree nunc pro tunc was fully argued on the 17th of September; the counsel for Mrs. Young, acting against her instructions, still contended that the court had no such power and that the action had abated, and

it appearing that no findings had been made, as the code of California requires when a case is tried by the court without a jury (Cal. Code Civ. Proc., secs. 632, 633), the judge suggested that if Mrs. Young's attorneys would waive a finding, it would be sufficient under section 634 of the code. Counsel for both parties then signed a written waiver of the filing of findings, and dated it as if it had been signed on September 4th, but it was not filed until December 11th. The court then took the matter under advisement until December 11th, when he entered a decree of divorce in favor of Young, gave Mrs. Young the custody of the child, and allowed her attorneys a fee of five hundred dollars, and entered the decree nunc pro tunc as of September 4, 1897.

These matters appear from the testimony of the several attorneys in the case. The only evidence of record pertaining thereto is embraced in the decree, which recites that the trial began on the 23d of August and was completed and the cause taken under advisement on the 4th of September, and that the decree was entered on December 11th as of September 4, 1897.

Thereafter, on January 20, 1898, upon motion of new counsel for Mrs. Young, the former counsel for Mr. Young [630] being present at the hearing, the court vacated the decree of divorce, and found that the waiver of findings was unauthorized by Mrs. Young, and that the court had no jurisdiction to enter the decree of divorce, because the action abated by the death of the plaintiff, Young, before the decree was entered. Thereupon Mrs. Young instituted this suit in partition against McCullagh's heirs and his administrator. The circuit court rendered judgment for the plaintiff, and the defendants appealed.

1. The decisive question in this case is the power of the California court to enter a divorce nunc pro tunc, after the death of the plaintiff in that case.

In Missouri etc. Ry. Co. v. Holschlag, 144 Mo. 256, 66 Am. St. Rep. 417, 45 S. W. 1101, this court, speaking through Williams, J., said: "It is not disputed, nor can it be, that the settled law of this state is that entries nunc pro tunc can only be made upon evidence furnished by the 'papers and files in the cause or something of record, or in the minute-book or judge's docket' 'as a basis to amend by': Gamble v. Daugherty, 71 Mo. 599."

The parol testimony introduced in this case was wholly incompetent and should have been excluded. Judgments of courts cannot be supported by parol testimony, and judgments

nunc pro tunc can only be entered where there is something of record which furnishes "a basis to amend by." But even if such evidence was admissible, it would be unavailing to support the defendant's contention in this case, for it shows that prior to September 7th, the California court had arrived at no final determination of the divorce case, but, on the contrary, expressly reserved the question of the allowance for the support of the child and for attorney's fees, until the 7th of September, and that the plaintiff died before the court convened on the 7th, and before any conclusion as to these questions had [631] been reached. So that it plainly appears that no judgment had been determined upon, much less announced, or any memorandum made, before the action abated by the death of the plaintiff therein, Mr. Young. In that race for the dissolution of the marriage bonds the "grim reaper" distanced the "divorce mill."

There was nothing among the papers and files in the cause, nothing of record, nothing in the minute-book or judge's docket, that could be looked to as a basis for a decree nunc pro tunc. The only thing that appeared in this way was what the decree itself, entered on December 11th, shows, and that is, that the trial began on August 23d and was completed on September 4th, and the case was then taken under advisement and the decree was entered on December 11th. This shows no order, decree, or judgment made or determined upon prior to Young's death. But as this decree was entered after his death, it could not be self-serving so as to afford a basis for a nunc pro tunc entry. It is true that the testimony of one of the counsel (Mr. Marble) shows that when the matter was being discussed on the 11th of December, and the allowance to the child was being discussed, "the court looked at the decree, and asked as to the provisions of the order of September 4th, whereupon I had the clerk of the court bring in the minutes of that day, and read aloud the entry." From which it may be argued that on September 4th, an order of some kind was made, and entered on the minutes of the clerk on that day, but no such order appears in this record. If the fact be as stated by Mr. Marble, a certified copy of the entry on the minutes should have been introduced in evidence in this case, and it could then have been seen whether it was sufficient to warrant an entry of a decree nunc pro tunc. Even the parol testimony does not show the character or terms of the order on the clerk's minutes. If it was, as the other parol testimony shows

the proceedings then had were, it would not show any final judgment, for the two matters above referred to were left open for further discussion [632] on September 7th, and until they were determined there could be no final judgment. However, as above pointed out, such matters lying wholly in parol, so far as this record shows, cannot be resorted to in aid of the entry nunc pro tunc.

Counsel for defendant, however, contend that this matter must be determined as of the laws of California, and that under the laws and decisions of that state the court had the power to enter the decree nunc pro tunc, because on September 4th the court announced orally that it would grant the divorce, and that the entry of the decree is a mere ministerial act which did not affect the judicial determination of the case.

If the record showed any judicial determination of the divorce case before Young's death, the mere fact that the clerk wrote the judgment upon the judgment-rolls after Young's death would not affect the judgment. But there is no evidence, record or otherwise, in this case, of any judicial determination of the divorce case before Young's death. What took place on September 4th did not amount to a judicial determination. Therefore, there is no room in this case for invoking or applying the doctrine as to the ministerial act of the clerk.

This leaves for consideration the contention that under the laws and decisions in California an oral announcement of the court, which of course can only be proved by parol testimony, is a sufficient basis for a nunc pro tunc decree. In support of this contention counsel cite In re Estate of Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 83 Cal. 415, 23 Pac. 392; Fox v. Hale etc. Mining Co., 108 Cal. 478, 41 Pac. 328; Holt v. Holt, 107 Cal. 258, 40 Pac. 390; Franklin v. Merida, 50 Cal. 289.

In California, "terms of court" are abolished and the courts are always open: Code Civ. Proc., secs. 73, 74. The code of that state further provides as follows:

"Sec. 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the [633] clerk within thirty days after the cause is submitted for decision.

"Sec. 633. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

"Sec. 634. Findings of fact may be waived by the several parties to an issue of fact: 1. By failing to appear at the trial; 2. By consent in writing filed with the clerk; 3. By oral consent in open court, entered in the minutes."

Under these provisions, there was no decree on September 4th, because there was no written finding of fact, and the waiver was not signed until December 11th, which was after Young's death.

Those provisions of the code have undergone judicial construction in that state, with the result that the rule has been established that there can be no final judgment in a case tried by the court without a jury, until the court has made up and filed with the clerk its written findings of fact and conclusions of law, except in cases of default when no findings are required, unless the parties waive a finding: Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60; San Joaquin Land etc. Co. v. West, 99 Cal. 345, 33 Pac. 928; Mace v. O'Reilley, 70 Cal. 231, 11 Pac. 721. So that, as in the divorce case there was no finding and no waiver thereof during Young's life, it follows that there was no judgment before the suit abated by his death.

An examination of the cases cited by defendant's counsel shows that there is no difference between the rule in this state, above pointed out, and the rule in California, as to the necessity of having something in the record as a basis for a decree nunc pro tunc.

In re Estate of Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 83 Cal. 415, 23 Pac. 392, was a suit for a divorce. The defendant made default, which, as shown, dispensed with a finding of fact. The court ordered a [634] decree of divorce on April 23, 1880, and the order was entered on the minutes of the court by the clerk, but the clerk did not enter the judgment on the rolls until after the death of the defendant. The court ordered the judgment to be entered nunc pro tunc as of April 23d. This was proper as the minutes furnished the record basis for the entry.

Fox v. Hale etc. Min. Co., 108 Cal. 478, 41 Pac. 328, was not a suit for a divorce, but was an action that survived the death. The court held that a court has an inherent right to enter a judgment nunc pro tunc, and that the parties cannot be prejudiced by the delays of the court in rendering a judgment, but that: "Where a defendant has died after a cause has been tried and finally submitted to the court for its judgment, and before

the filing of findings and entry of a decree, the court has power to order its findings to be filed nunc pro tunc, and its judgment therein to be entered nunc pro tunc, as of a date prior to the death of the defendant." This decision must be read in the light of the facts presented in that case for decision, which were that the case was tried and submitted on May 3, 1892, and on May 26th "the court filed a written opinion announcing its conclusions, and directing counsel to prepare findings and a decree in accordance with said opinion." The defendant died June 2, 1892, before the findings were filed or the decree entered, and the court ordered its findings and judgment to be entered nunc pro tunc as of May 26th. It is thus apparent that there was record evidence (the written opinion of the court announcing its conclusions) which afforded a basis for a nunc pro tunc finding and decree.

Holt v. Holt, 107 Cal. 258, 40 Pac. 390, was an action for a divorce. The case was tried by jury, who returned a verdict, upon special issues, that the parties were never married. The court orally gave judgment for the defendant and dismissed the case. The clerk entered the order on the minutes on the same day, but did not enter the judgment on the rolls. Afterward, the plaintiff moved to have the case docketed for hearing because [635] no judgment had ever been entered on the rolls. The court overruled the motion and entered a decree nunc pro tunc. It was held by the supreme court that the action of the court was an adoption of the verdict and that a finding of fact was not necessary, and that the nunc pro tunc decree was proper. It will be observed that all the parties were still alive, and that the suit had not abated. Here, also, there was sufficient record evidence to afford a basis for a nunc pro tunc decree.

Franklin v. Merida, 50 Cal. 289, was an action in ejectment. The case was tried by the court without a jury. "On October 2, 1869, the court made the following order for judgment in favor of the plaintiff, and it was entered by the clerk in his book of minutes of the court: 'This cause having been heretofore tried before the court without a jury, and submitted for consideration and decision, it is now ordered that plaintiff in this cause have judgment against the defendants for possession of the premises described in the complaint, together with costs of suit.'" The clerk did not enter the judgment on the rolls, but on October 1, 1874, the clerk entered the judgment

on the rolls and on the same day issued a writ of restitution, which was executed on October 6, 1874. On October 7, 1874, the successors to the defendant moved to be restored to the possession on the ground that the plaintiff had died before the judgment was entered on the rolls and before the writ of restitution was issued. It appeared, however, that the plaintiff had sold his interest and that the writ was issued at the request of the grantees, and on their motion the court ordered a decree nunc pro tunc as of October 2, 1869, and denied the motion of the successors to the defendant to be put back into possession. The supreme court sustained the judgment, but instead of putting it on the ground that there was record evidence affording a basis for a nunc pro tunc decree, said there was no necessity for such an amendment, as the judgment was rendered October 2, 1869, in the lifetime of the plaintiff, although not recorded until October 1, 1874, after his death. There was [636] here also ample record evidence for a judgment nunc pro tunc.

It thus appears that, when analyzed, there is no difference between the rule announced in the California cases and that so tersely and comprehensively stated by Williams, J., in Missouri etc. Ry. Co. v. Holschlag, 144 Mo. 256, 66 Am. St. Rep. 418, 45 S. W. 1101, that "entries nunc pro tunc can only be made upon evidence furnished by the 'papers and files in the cause, or something of record, or in the minute-book or judge's docket,' 'as a basis to amend by.'" Tested by this rule it follows that the divorce case of Young v. Young abated on September 7th, by reason of the death of the plaintiff, and that at that time no decree had been entered, and that there was no record evidence to justify a nunc pro tunc entry of a decree afterward, and the judgment of the California court was void. Mrs. Young was, therefore, the wife of Mr. Young when he died, and, as his widow, is entitled to maintain this action. No other suggestions of error having been made, the judgment of the circuit court is affirmed.

All concur.

The Power to Enter Judgments Nunc pro Tunc in proper cases is inherent in courts of law and equity: Knefel v. People, 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388; Ware v. Kent, 123 Ala. 427, 82 Am. St. Rep. 132, 26 South. 208. The evidence upon which such entry may be made is considered in the monographic note to Ninde v. Clark, 4 Am. St. Rep. 831-833. In Ohio, the court may resort to all sources of information that are competent under the general rules of evidence, including the parol testimony of wit-

nesses: Jacks v. Adamson, 56 Ohio St. 397, 60 Am. St. Rep. 749, 47 N. E. 748. And in Texas the proof may as well be made by parol as by record evidence: Gonzales v. State, 35 Tex. Cr. Rep. 339, 60 Am. St. Rep. 51, 29 S. W. 1091, 30 S. W. 224. But in Missouri the entry can be made only upon evidence furnished by the papers and files in the cause or something of record, or in the minute-book or judge's docket: Missouri etc. Ry. Co. v. Holschlag, 144 Mo. 253, 66 Am. St. Rep. 417, 45 S. W. 1101.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

TEPPER v. SUPREME COUNCIL OF THE ROYAL ARCANUM.

[61 N. J. Eq. 638, 47 Atl. 460.]

BENEFIT SOCIETIES—"RELATIVES," WHO ARE.—If the constitution and by-laws of a benefit society provide that its benefit fund shall be "for the purpose of assisting the widows, orphans or other relatives of deceased members," the word "relatives" includes relatives by marriage as well as relatives by blood. (pp. 450, 452.)

BENEFIT SOCIETIES — BENEFICIARIES — STEP CHILDREN AS MEMBERS OF FAMILY.—If the constitution and by-laws of a benefit society permit benefits to be made payable to "the members of the family" of a member as designated by him, he may lawfully designate his step children, brought up in his family as his beneficiaries, even after they have married and left his household. (pp. 452, 454.)

BENEFIT SOCIETIES—BENEFICIARIES—MISDESCRIPTION.—If a member of a benefit society, in naming his step children as his beneficiaries, describes them as "my children," such misdescription, if material, can be taken advantage of only by the society, and cannot be objected to by a rival claimant to the benefit fund. (pp. 454, 455.)

BENEFIT SOCIETIES—WAIVER OF MISDESCRIPTION OF BENEFICIARY.—If a member of a benefit society in naming his beneficiaries misdescribes their relation to him, the society may waive the defect and ratify the agreement, and if it answers averring its willingness to pay after full notice of the truth, this constitutes such waiver and ratification. (p. 455.)

R. E. Rabe, for the appellants.

J. E. Walscheid and J. B. Vredenburgh, for the respondent.

DIXON, J. On June 5, 1885, William Tepper became a member of Hoboken Council, No. 99, a subordinate lodge

of the supreme council of the Royal Arcanum, and on July 8, 1885, he received a benefit certificate of the order, by which the supreme council bound itself to pay to Anna Plondrick, Antoinette Siebury, Wilhelmina Ranges, August Zuber, Wilhelm Zuber and Friedrich Tepper a sum not exceeding three thousand dollars, on the death of said William Tepper. This certificate was issued to him on an application in which he described the persons above named as being "related to me as my children." He died January 16, 1898. Afterward a dispute respecting the right to the three thousand dollars arose between Friedrich Tepper, who is the only child of William Tepper by nature, and the other beneficiaries, who were the stepchildren of William Tepper through his marriage with their mother; and thereupon Friedrich filed a bill in chancery against the stepchildren and the supreme council to secure the payment of the whole sum to himself. By its answer the council declares itself ready to pay the money as the court may decree.

The question in the case, therefore, is whether the complainant is entitled to the entire fund, or only to a share in conjunction with the stepchildren.

The Royal Arcanum was organized in Massachusetts on November 5, 1877, under a statute of that state passed May 9, 1877, which provided for the organization of such societies "for the purpose of assisting the widows, orphans or other dependents of deceased members." In 1882 a supplement to the statute was passed, empowering such organizations to adopt by-laws and provide funds "for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any person dependent upon deceased members." In 1884 the Royal Arcanum adopted an amended constitution, according to which a member's benefit certificate was to be made payable "to his family or those dependent on him, as he may direct," and also amended by-laws, which required the member applying for a certificate to "enter upon his application the name or names and relationship or [640] dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid," and which also provided that "when no relation by marriage or consanguinity is shown in the direction for payment of benefit, proof of dependency must be furnished to the supreme secretary, before the benefit certificate is issued."

William Tepper married the mother of these stepchildren in 1864, when the oldest of them was about eleven years of age, and thereafter they lived with him and his wife as members of his family, assisting, as soon as they were able to work, in meeting the expenses of the household, until they married. But before 1885 they had all married and left their parents' home.

In determining the right of these stepchildren to share in the fund, we must first consider the scope of the Massachusetts statute, for it is settled that these beneficial societies cannot create funds for the benefit of persons outside of the classes mentioned in the statute: American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Britton v. Royal Arcanum, 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675, affirmed in 47 N. J. Eq. 325, 21 Atl. 754; Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908. But in determining who constitute those classes, the supreme court of Massachusetts, in the case first cited, declared: "It is the duty of the court to construe the statute liberally and in such manner as to carry out the benevolent purpose sought to be provided for, and in no event, unless absolutely required by its language, to construe it so as to defeat such purpose": American Legion of Honor v. Perry, 140 Mass. 589, 5 N. E. 636.

The classes mentioned in the statute existing when the present certificate was issued are those described as "widows, orphans, or other relatives of deceased members, or any person dependent on deceased members."

According to the opinion of this court, in Bennett v. Van Riper, 47 N. J. Eq. 563, 24 Am. St. Rep. 416, 22 Atl. 1055, where the words "related to" in the by-law of a benevolent order similar to the Royal Arcanum was under consideration, the relatives of deceased members include relatives by affinity as well as relatives by blood. Following the lead of that case, we should regard stepchildren as relatives, within the meaning of the Massachusetts statute. But [641] it is urged that the meaning of this word has been fixed by the supreme court of Massachusetts as being confined to relatives by blood (Esty v. Clark, 101 Mass. 36, 3 Am. Rep. 320; Kimball v. Story, 108 Mass. 382), and that we are bound by that definition. We think, however, that these cases are not in point. They deal with a statute declaring the effect of a "devise of real or personal estate to a child or other relation of the testator,"

when the devisee dies before the testator, leaving issue who survive the testator. Under the settled rule for the construction of wills, which limits the meaning of "relatives" to those who would take under the statute of distribution, the court held that this statute used the term in this "strict legal and technical sense." But to apply the same rule to the statute now in hand would certainly not be "to construe the statute liberally," as the Massachusetts court, in American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634, said was proper, and we incline to think that that court would make the same distinction as was made by us in Bennett v. Van Riper, 47 N. J. Eq. 563, 24 Am. St. Rep. 416, 22 Atl. 1055, where the rule applied to wills was expressly held to be too narrow for these benevolent associations.

We therefore conclude that the statute of 1882 permitted the designation of stepchildren as beneficiaries.

The next question is whether the constitution and by-laws of 1884 permitted such a designation. They authorized payment to be made to a member's "family as he may direct," and required the member to declare "the relationship of the members of his family to whom he desires the benefit paid," and provided for what should be done when "no relationship by marriage or consanguinity is shown."

As to the term denoting relationship, we see no reason for giving it a narrower meaning than that borne by the same term in the statute. The express reference to relations by marriage adds to the probability that it was used in the broad sense, including not only the spouse, but also the kindred of the spouse. But these internal laws of the order indicate that the beneficiaries must also be "members of the family" of the applicant designating them. These words also have much elasticity of signification. For their true import the constitution and by-laws must be read in connection with the statute under which they [642] were adopted. The statute, as above interpreted, authorized the establishment of a fund for two classes of beneficiaries, viz., relatives, by blood or marriage, of the member, and those dependent on the member. The constitution declared that a member's share of the fund was to be paid to "his family, or those dependent on him," as he directed. By the by-laws the member was to state "the names and relationship or dependence of the members of his family, or those dependent upon him"—i. e., as to members of the family, the relationship must be stated; as to others,

the fact of dependency must be stated. There is a natural probability that, when the members of this society were adopting their constitution and by-laws, they would take to themselves as wide a liberty of choice for their selection of beneficiaries as the statute permitted. Bearing in mind the elasticity of the word "family" it is not unreasonable to believe that they intended it to be as broad as the word "relatives" in the statute. Relatives and dependents are the statutory classes; family and dependents are the terms which the association used to describe the same classes. Such seems to have been the understanding of Vice-Chancellor Van Fleet, when, in American Legion of Honor v. Smith, 45 N. J. Eq. 466, 471, 17 Atl. 770, 772, speaking of a constitution and by-laws just like those now before us, he said: "The complainant undoubtedly had capacity, when it made the contract in question, to agree to pay other relatives of Smith than those constituting his family," using the term "family" in its strict sense.

But if the word "family" was intended to be more restrictive than the word "relatives," still it may include these stepchildren. When William Tepper married their mother, they became members of his family in the strictest sense, for they became part of his household and were supported by him as his own offspring. Did, then, the fact that, when the application for this benefit was made, they had, in the usual course of family development, separated themselves from his household exclude them from membership in his family within the purview of these laws? If it did, then, by the same rule, his own offspring would, in like case, be excluded. Such a rule, we think, would antagonize [648] the benevolent designs of these associations, and we are not disposed to sanction it.

But, with regard to the effect of the constitution and by-laws on this certificate, there is another feature of the case to be considered. In Massachusetts Catholic Order of Foresters v. Callahan, 146 Mass. 393, 16 N. E. 14, and Marsh v. Supreme Council American Legion of Honor, 149 Mass. 512, 21 N. E. 1070, the corporations had been organized under the Massachusetts statute of 1877, and in their constitutions and by-laws recognized widows, orphans, and dependents as the only permissible beneficiaries; after the passage of the supplement of 1882, each of the corporations, without making any change in its internal laws, accepted the application of a member which designated his mother, who was not dependent upon

him, as the beneficiary. The court sustained the claim of the mother, holding that, after the passage of the act of 1882, neither the corporations nor any claimant of the fund could be allowed to set up that the former were exercising, and were only authorized to exercise, the more limited powers conferred by the earlier statute. In the Marsh case the prior decisions in Elsey v. Odd Fellows' Mut. Relief Assn., 142 Mass. 224, 7 N. E. 844, and Tyler v. Odd Fellows' Mut. Relief Assn., 145 Mass. 135, 13 N. E. 360, were referred to, and on this point substantially overruled. These later decisions of that court, on the powers of corporations established under the Massachusetts statute and on the mode of exercising those powers, have almost, if not quite, absolute authority: American Legion of Honor v. Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1048. The principle on which they rest is not disturbed by such cases as Skillings v. Massachusetts Benefit Assn., 146 Mass. 217, 15 N. E. 566, where a person outside of the statutory classes was designated as beneficiary, and McCoy v. Roman Catholic Mut. Ins. Co., 152 Mass. 272, 25 N. E. 289, where the person claiming to be a member was not within the class of persons eligible to membership.

On these grounds we reach the conclusion that the stepchildren could legally be named as beneficiaries, according to the laws in force when this certificate was issued.

But it is further contended that changes subsequently made in the constitution and by-laws of the order so restricted the class of relatives to whom benefits could be made payable as to exclude stepchildren. We have carefully examined the changes [644] referred to, and, in respects said to be applicable to the present case, they appear not designed to have retroactive force. In those respects their terms can have reasonable effect if applied only to designations of beneficiaries thereafter made, and in such conditions the settled rule of construction is not to extend the laws to past transactions: Citizens' Gas Light Co. v. Alden, 44 N. J. L. 648. The cases cited by counsel to support the proposition that changes in the by-laws may affect such certificates as that before us, all relate to changes which clearly expressed a purpose to reach prior contracts.

The designation of the stepchildren as "my children" is also made the ground of attack on behalf of the complainant, because of the provision in the agreement that any untrue or fraudulent statement or any concealment of facts in the appli-

cation should forfeit the rights of the applicant and his family or dependents to all benefits and privileges. It is questionable whether this clause bound the member to anything beyond honesty in his disclosures, and we are quite satisfied that the description of these beneficiaries as "my children" was honestly made. But if it bound him to accuracy, and the description be deemed inaccurate, the objection could be taken advantage of by the association only. Under the view which we have adopted of the statute and the laws of the order an accurate description of these beneficiaries does not show the contract to be illegal, and as the corporation could have made the contract without any description at all, it is within the power of the corporation to waive the defect and ratify the agreement. Its answer averring its readiness to pay, filed after full notice of the truth, is such waiver and ratification.

The decree of the court of chancery holds the stepchildren entitled to an equitable lien on the fund for money advanced by them to pay the annual dues of William Tepper in the society. No such claim is presented in the pleadings; on the contrary, the answer of the stepchildren prays that the fund may be divided among themselves and the complainant in equal shares. We therefore need not consider whether such a lien exists.

On the issues raised in the case our judgment is that the fund should be paid in equal shares to the beneficiaries named in the certificate.

[645] Let the decree below be reversed, and a decree be entered in accordance with this opinion.

Benefit Society.—No person not of the class for whose benefit a mutual benefit society is authorized can be a beneficiary. It has been held, however, that the step daughter or step father of a member may be designated as beneficiary: See the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 560, 561. An illegitimate child cannot be designated as a beneficiary under a statute limiting the beneficiaries to the husband, wife, children, and relatives of a member: Lavigne v. Ligue des Patriotes, 178 Mass. 25, 86 Am. St. Rep. 460, 59 N. E. 674. If a member of an association desiring to make his son in law his beneficiary, which, being prohibited by the articles of the association, he, with its consent, makes his niece his beneficiary, with her agreement that she will pay over the benefit fund to such son in law, she may be compelled to carry out the terms of the trust. No one but the society can contest its validity: Cowin v. Hurst, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274.

FULLER v. HOLLANDER & CO.

[61 N. J. Eq. 648, 47 Atl. 646.]

CORPORATIONS—POWER TO COMPEL INSPECTION OF BOOKS OF.—The inherent jurisdiction of a court of chancery to compel the production for inspection of books and papers, whether of an individual or corporation, is confined to cases where they are evidential in a cause pending in court, and cases arising under a bill filed for relief as well as discovery, or for discovery only, in aid of a prosecution or defense in litigation pending or contemplated. (p. 457.)

CORPORATIONS — INSPECTION OF BOOKS. — MANDAMUS is the sole remedy of a stockholder wrongfully refused inspection of the books or papers of a corporation. (p. 457.)

CORPORATIONS—POWER TO COMPEL INSPECTION OF BOOKS.—Under a statute empowering the court of chancery, the supreme court, or any justice thereof, upon proper cause shown, to summarily order any or all of the books of a foreign corporation to be forthwith brought into the state and kept therein for such time as may be designated in such order, the power granted can be exercised only when a condition arises wherein the judicial authority whose action is invoked can exercise control over such books for some lawful and useful purpose, and such condition constitutes proper cause for the exercise of the authority. (pp. 458, 459.)

R. H. McCarter and A. E. Seibert, for the appellant.

W. H. Apgar and W. R. Spooner, for the respondent.

650 COLLINS, J. We have not examined the question considered by the learned vice-chancellor, because we think that the order advised was coram non judice. The order was made after summary hearing upon an original petition not filed in, or referring to, any pending cause. The petitioner alleged that he was the holder of stock in a company formed under the general corporation act of this state, and was also the secretary and treasurer thereof, and that, except the stock and transfer-books, all the books of the company were in the city of New York, in the custody of the president of the company. He further alleged that the president owed the company, and that he believed its funds had been illegitimately used. He further alleged that he had demanded and had been denied an accounting by the president, and had been refused an examination of the books and papers of the company. He prayed that the president might be ordered forthwith 651 to produce, at a convenient place within this state, for examination by the petitioner, all the books, accounts, and memoranda that would show the financial condition of the company.

Unless support can be found for such a proceeding in section 44 of the revised general corporation act (Pub. Laws 1896, p. 292), it can be found nowhere. The inherent jurisdiction of the court of chancery to compel the production, for inspection, of books and papers, whether of an individual or corporation, is confined to cases where the same are evidential in a cause pending in the court (Lawless v. Fleming, 56 N. J. Eq. 815, 40 Atl. 638), and cases arising under a bill filed for relief as well as discovery, or under a bill filed for discovery only, in aid of a prosecution or defense in litigation, pending or contemplated: Pomeroy's Equity Jurisprudence, secs. 190, 209; Daniell's Chancery Pleading and Practice, c. 42. We have found no judicial opinion declaring any ampler power, except In re Steinway, 159 N. Y. 250, 258, 53 N. E. 1103, which was on mandamus, but in which it was said by Mr. Justice Vann that, from an early day in England, the court of chancery had enforced by motion and the king's bench by mandamus the right of a corporator to inspect, for a proper purpose, the books and papers of the corporation. The chancery cases cited are instances of incidental orders, in pending proceedings, authorized by recent acts of parliament, and do not bear out the dictum of the learned judge.

The sole remedy of a stockholder wrongfully refused inspection of the books or papers of a corporation is by mandamus. In the earlier English cases the judges of the king's bench generally refused that prerogative writ where the defendant was a private corporation, but its jurisdiction to grant it is indisputable, and in this country, where the corporate rights rest on statute, the exercise of such jurisdiction is universal: Rosenfeld v. Einstein, 46 N. J. L. 479; Commonwealth v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184, where the authorities are cited.

It will be found that the cases in this country where production, for inspection, has been ordered in an independent proceeding, not strictly mandamus, have been in states where the jurisdiction of the courts of law and equity has been blended, [652] and the line of demarcation between remedies has become indistinct: Thompson on Corporations, sec. 4432.

Our court of chancery claims no inherent jurisdiction in this regard. In Stettauer v. New York etc. Construction Co., 42 N. J. Eq. 46, 53, 6 Atl. 303, Chancellor Runyon held that the mere refusal of permission to a stockholder to examine the books of a corporation was not a ground for equitable inter-

ference, the law furnishing an adequate remedy in the writ of mandamus, and he sustained a demurrer to a bill filed to compel such permission. The same learned chancellor, however, was of opinion that a provision of the general corporation act, substantially the same as that above cited, authorized the compulsory production in this state, and, impliedly, inspection, of the books (but not other papers and memoranda) of a corporation that by the grace of the legislature, were customarily kept without the state, and this on the mere petition of a stockholder that he was denied such inspection, and he made order accordingly: Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 474; 42 N. J. Eq. 139, 7 Atl. 521. Vice-Chancellor Bird ordered production for inspection under like circumstances: Mitchell v. Rubber Co. (N. J. Eq.), 24 Atl. 407. There are probably other unreported cases of the assumption of such a power, but we think it unauthorized. It is, at least, doubtful whether, since the adoption of the constitution of 1844, this branch of the jurisdiction of our supreme court can be conferred on another tribunal: Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Green v. Heritage, 64 N. J. L. 567, 46 Atl. 634. As we construe the statute involved, the legislature has not attempted to do so.

As now subsisting, section 44 of the general corporation act, after declaring that the directors of any corporation may, if the by-laws or certificate of incorporation so provide, keep the books of the corporation, except the stock and transfer-books, outside of the state, provides as follows: "The court of chancery or the supreme court, or any justice thereof, may, upon proper cause shown, summarily order any or all of the books of said corporation to be forthwith brought within this state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such order may be declared forfeited by the court making such order, and it shall [653] thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order."

We discern in this statute no legislative purpose to enlarge jurisdiction for the compulsory production of books for inspection. The true construction of the section quoted, so far as it confers power upon a justice of the supreme court or upon the court of chancery, is that whenever proper cause is shown to the judicial authority whose action is invoked, the

books of a corporation that are by law permitted to be kept outside the state may be summarily ordered brought within the territorial control of such judicial authority. Proper cause would be shown by presenting a situation within the range of such authority, in which the production of the books would subserve some lawful or useful end within the judicial control. No other jurisdiction is conferred.

The statute is useful, if not necessary, because of the summary character of the proceeding it authorizes, because of its drastic penalty for disobedience, and because cases may, and frequently do, arise where the corporation itself is not a party to litigation in which, nevertheless, its books may be legal evidence, but it cannot be construed so as to support the order appealed from, which must, therefore, be reversed.

The Right of a Stockholder to Inspect the Books of the corporation is usually enforced by mandamus: Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; though injunction is a proper remedy: Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033. The shareholder is not required to show any reason or occasion for making the examination, nor can his right thereto be defeated by inquiry into his motives: Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. The right is absolute, except that it shall not be exercised from idle curiosity or for improper motives. The custodian cannot question the motives and purposes of the stockholder: Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588. But see Legendre v. New Orleans Brew. Assn., 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837. As to the right of a stockholder in a foreign corporation to enforce his right to inspect the corporate books, see State v. North American Land etc. Co., 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172.

CHAPMAN v. BATES.

[61 N. J. Eq. 658, 47 Atl. 638.]

POWERS OF ATTORNEY COUPLED WITH AN INTEREST, or given for a valuable consideration, or as part of a security, unless expressly made revocable, are irrevocable, whether their irrevocability is expressed or not. (p. 465.)

POWER OF ATTORNEY TO VOTE AND DEAL WITH STOCK—REVOCABILITY.—A power of attorney made by a stockholder to vote and deal with his stock, or sell and exchange it, conferring an interest, and by its terms irrevocable, cannot be revoked by the maker in the absence of a showing of illegal purpose in granting the power, or that it is in violation of statute or against public policy. (pp. 460, 467.)

CORPORATIONS.—POOLING OR COMBINING OF CORPORATE STOCK with an object to carry out a particular policy to promote the best interests of all the stockholders, is not necessarily illegal. (p. 467.)

C. L. Corbin, for the appellant.

C. D. Thompson, for the respondents.

659 GARRETSON, J. The complainant, being the owner of fifty-one shares of stock of the Union Terminal Association, a corporation of this state, on the sixth day of July, 1899, executed a paper called a proxy and power of attorney, appointing the defendants his proxies and attorneys in fact, and in pursuance thereof delivered to them the certificates for said shares of stock.

This proxy and power of attorney was therein declared to be in force for the period ending January 1, 1902, and to be and remain irrevocable during said period.

It is sought in the bill filed in this case to revoke this instrument, which, in terms, is declared to be irrevocable before the expiration of the period limited, upon the grounds that its provisions are in violation of the terms of the act concerning corporations under which the Union Terminal Association was incorporated, and are in conflict with public policy and with the laws of the state of New Jersey.

The case was heard on bill and answer and a decree dismissing the bill.

The proxy and power of attorney executed by the complainant recites that certain owners and holders of shares of the capital stock of the Union Terminal Association deem it to be for their best interests and as especially desirable to aid in securing the speedy completion of the properties represented to unite their 660 stock, and all that is represented therein and thereby, by placing their certificates of stock in the possession and control of certain persons, as proxies and attorneys in fact, to be held, managed, and used by them, in their discretion, for the equal pro rata benefit of all stockholders who may join in this proposed union of interests; it then appoints the defendants proxies and attorneys in fact, to have, use and exercise any and all complainant's rights and powers in, to, and under any and all of his said stock of the said Union Terminal Association, and to receive, take, retain, hold, use, and employ any or all of his said stock to aid in the promotion of any and all purposes which his said proxies and attor-

neys in fact may deem best, and to join any and all his shares of stock of the said Union Terminal Association, and all his rights and powers thereunder with any and all shares of stock of other stockholders who may deposit their certificates of stock with said defendants, and execute and deliver to them a proxy and power of attorney of the same tenor and effect, for any and all purposes which his said proxies and attorneys in fact shall deem to be for the best interest of all such stockholders, for the period ending January 1, 1902; this proxy to be and remain irrevocable during said period.

It authorizes the proxies and attorneys in fact, at their discretion, to vote and act upon any or all of the shares of the capital stock of the Union Terminal Association, at any or all meetings of the shareholders of said corporation. All stock deposited under the proxies to constitute one holding in the attorneys. It authorizes the proxies and attorneys in fact to make any and all demands, and exercise any and all rights which he might make or exercise as a holder or owner of said stock of said Union Terminal Association, and to recover and receive all moneys and obtain payment of all indebtedness due to such holder, and to represent him in any suit and at any sale of properties in which, as a stockholder of the Union Terminal Association, he might be interested, and to make bids and use the stock for bidding for and acquiring all such properties, and to take title and dispose of such properties; to procure the organization of a corporation; to exercise all the rights granted to the attorneys; to appoint an agent to hold title to such property as [661] may be represented by his stock, and direct the management and disposal thereof.

It authorizes them to take all action necessary to form a corporation under the laws of Missouri; to make available all properties controlled by his stock of the Union Terminal Association, and to manage such new corporation, and sell the stock therein, and to exchange the stock of the Union Terminal Association for stock in the new corporation, and exercise all the powers granted over the new shares of stock in the new corporation; to hypothecate the shares of stock of the Union Terminal Association, or of the new corporation; to sell the stock of the Union Terminal Association, or of the new corporation, at not less than one hundred dollars a share, accounting for the proceeds, after deducting the proportionate share of all costs, expenses and compensation of the attorneys;

no distribution need be made before and the stockholder agrees not to sell or dispose of his stock prior to the termination of the power of attorney; to receive all dividends and earnings on the stock of the Union Terminal Association, or of the new corporation, and disburse the same, or retain them until the termination of the power of attorney; to substitute new attorneys, with the same powers; to relinquish the powers granted and return the stock; to receive from attorneys previously appointed certificates of stock in the Union Terminal Association.

It appears by the answer that the Union Terminal Association was organized on the sixth day of July, 1898; that, by its certificate of incorporation, it was authorized:

1. To acquire and dispose of the stock, bonds, etc., of the Kansas City and Atlantic Railroad Company, of Missouri, the Terminal Improvement Association, of Kansas City, Missouri, and of the Missouri Agricultural and Fair Grounds Association, of Gallatin township, Missouri, corporations of Missouri, or of any other corporations of Missouri organized for similar purposes.

2. To acquire and convey all properties and rights of the foregoing corporations.

3. To buy, sell, and deal in real estate; to promote agriculture and the improvement of stock; to reclaim land; to promote, erect, and construct dykes, breakwaters, canals, and embankments for the reclaiming of land; to build, erect and construct wharves, docks, and levees; to build, lease, erect, and construct warehouses, grain elevators, storage-houses, and other buildings; to promote, lease, erect, and construct, maintain, and operate toll bridges, railroad terminals, stations and depots for the reception and transmission of personal property; to convey and transport personal property on land or by water, or across rivers and other waters, by any mode of conveyance whatsoever, and to charge and receive compensation therefor.

4. To issue bonds and secure them by mortgage.

It further appears by the answer that the authorized capital stock of the Union Terminal Association is $5,000,000, of which $1,962,900 has been issued and is outstanding, and that the same is held by about five hundred stockholders, and that the defendants are personally both large stockholders in said corporation, owning and holding several hundred shares of

stock therein; that after said corporation was formed, and in order to carry out the purposes set forth in the certificate of incorporation, the directors proceeded to acquire, and have acquired, over ninety-six per cent of the total issue of stock of the Kansas City and Atlantic Railroad Company, amounting to over $2,000,000 par value, and have every share of stock of the Terminal Improvement Association, of Kansas City, amounting to two thousand shares, of the par value of $200,000, and have a majority of all the stock of the Missouri Agricultural and Fair Grounds Association, of Gallatin township, Missouri, amounting to $48,000 par value out of a total capital stock of $90,000, and have also acquired all the issued and outstanding first mortgage bonds of the Kansas City and Atlantic Railroad Company, amounting to $600,000; that the underlying purpose of said corporation was the completion of a partially constructed combination double-track, triple-deck railroad and highway bridge for railroad traffic and general business over the Missouri river, and in connection therewith the construction and operation of a grand union passenger station in the city of Kansas City, with the approaches, yards, and accessories thereto, and that much has been done and valuable property acquired in furtherance of said purposes, all of which [illegible] possesses great prospective value, but that the project, as a whole, was incomplete and imperfect, and that the titles, rights, and franchises obtained had not been perfected, and that, in order to be completed and become of financial value, much of what had been done had to be gone over—defects in title remedied, important legislation secured and actual construction carried on; and that in order to properly develop the rights, privileges, franchises, and property owned by the said several corporations, some plan must be adopted which would extend over a period sufficiently long to secure the desired results, and to that end all of the stockholders of the Union Terminal Association were advised that some agreement should be entered into which would provide for a union of interests and confer upon such individuals as they should select all the powers and privileges contained in the proxy and power of attorney, and should surrender their certificates of stock to said attorneys for the term therein named, in order that the interest should continue unchanged during the term within which it was confidently expected that the desired results might be accomplished, and the foregoing proxy and

power of attorney was prepared, and, after careful examination and full discussion, was executed by about eighty per cent both in number of stockholders and in shares of stock of the Union Terminal Association, and the certificates of stock delivered. The answer further sets forth that the action of the stockholders in thus conferring the rights, powers, and privileges contained in the proxy and power of attorney has enabled the directors of the company to undertake and pursue a policy of development of the plans of the company and to obtain certain important action by which they have been able to secure very valuable rights and franchises, the removal of clouds upon the titles of land already acquired, and other valuable advantages for the said corporation, which has already greatly enhanced the value of the stock held by the several stockholders of the company, and which would have been impossible had not the right and power given under the proxy and power of attorney been irrevocably conferred.

The answer further sets forth that, in order to secure the said rights and property, a great deal of work was done by the defendants [664] and much money expended, and that the directors would not have expended the money nor the defendants devoted the time and labor to its accomplishment had it not been believed that the proxy and power of attorney was irrevocable; that much still remains to be accomplished to secure the results and value which the plan adopted contemplates; that the desired results can only be obtained through the continuance of said union of interests for the period named, within which it is confidently believed that the necessary work can be completed, and that the withdrawal by the complainant and other stockholders therefrom would not only cause the loss of much that has already been accomplished—the value of which depends on the completion of the general plan—but would also prevent further work in development thereof, and a loss of the great prospective value thereon; that amongst other powers given them by the proxy and power of attorney was the power of absolute disposal or exchange of said shares of stock in the said corporation, either for cash or for shares of stock in some corporation, and that, in pursuance of the powers thus given them, the defendants have entered into negotiations for the sale and have offered for sale, in one lot, the entire amount of stock so held and controlled by them under said proxy and power of attorney, and which ne-

gotiations are now pending, and which offers may be accepted at any time; that the complainant knew of the fact that the defendants had entered into negotiations for the purpose of disposing of the property of the Union Terminal Association, and had offered the same for sale, and had given options thereon; that the defendants have themselves loaned large sums of money and have secured other large sums of money, amounting to many thousands of dollars, which have been expended for the benefit of said corporation and its stockholders, on the faith of the representations and agreements entered into by the complainant and other stockholders.

This instrument which gave the defendants control over the complainant's stock appears to have been for a common interest; it is consistent with the purposes for which the corporation was created, and its continuance appears to be necessary for the advantage [665] of all who are interested in the development of the property.

A power of attorney may become irrevocable whenever the object is to create an interest; and this is so even if it is not stated in the instrument itself to be irrevocable. While the general rule is that a principal may revoke the authority of his agent at his mere pleasure, an exception to this rule is when the principal has expressly stipulated that the authority shall be irrevocable and the agent has an interest in its execution: Story on Agency, sec. 476. But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, there, unless there is an expressed stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not: Story on Agency, sec. 477; Hunt v. Rousmaniner, 8 Wheat. 174; Durbrow v. Eppens, 65 N. J. L. 10, 46 Atl. 582. In this last case illustrations of irrevocable power of attorney can be found.

We also agree with the learned vice-chancellor in the view that this instrument conferred upon the defendants powers to be executed as a trust for the benefit of all concerned, and conferred upon them a duty to account, as trustee, to all who joined in this power of attorney.

By "An act concerning corporations" (Pub. Laws 1896, p. 282) it is provided, in section 17: "Absent stockholders may

vote at all meetings by proxy, in writing; and every corporation may determine by its certificate of incorporation or by-laws the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting in order to constitute a quorum."

This section applies to all stockholders' meetings, and has been held, in the absence of any provision in the certificate of incorporation or by-laws to the contrary, to secure to each shareholder one vote for each share of stock held by him and appearing by the books of the company to be in his ownership (Camden 666 etc. R. R. Co. v. Elkins, 37 N. J. Eq. 273), but the certificate of incorporation or by-laws may make different provisions: Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454. There does not appear, however, to be anything in the certificate or by-laws varying the statutory provision.

It is further provided in section 36 of the corporation act: "Unless otherwise provided in the charter, certificate or by-laws of the corporation, at every election each stockholder, whether resident or nonresident, shall be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date."

This section applies only to voting at elections. Both of these sections seem to have been enacted for the convenience of stockholders who, for any reason, do not attend stockholders' meetings, and provides a method by which their wishes, as set forth in the proxy, may be given expression in their absence, and there is nothing in either of the sections which prevents a stockholder who has given a proxy from exercising his right to vote in person, if present, at any meeting at which a vote of the stockholders is taken.

The only limitation as to time for which such proxies may continue is in the thirty-sixth section, which prevents the use of a proxy for voting at elections after three years from its date. There is nothing in either of the sections which prevents a stockholder from appointing an attorney to vote his stock for him at any stockholders' meeting for any time he may choose, save only meetings for elections above the time

limit of three years. They do not, in terms, prevent a stockholder from giving an irrevocable power of attorney to vote at stockholders' meetings, subject to the time limit as to elections, nor can we see any reason why a stockholder may not give such a proxy if he chooses, and be bound by it; he can easily avoid the effect of it by appearing and voting in person at all meetings.

There is no statutory provision, nor can we perceive any reason offensive to public policy, preventing a stockholder from [667] giving another powers over, or rights in, his shares in a corporation to the same extent that he might give in any property.

We recognize the principle laid down in Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847, and White v. Thomas Tire Co., 42 N. J. Eq. 179, 28 Atl. 75, that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation, but in this case complaint is not made by one claiming that injury has been done to his interest by reason of a stockholder devesting himself of control of his stock, but by one of the very parties who has entered into this agreement and to which his consent has been given. He cannot complain of the injury done to his interests by this action, for he is a consenting party. Such arrangements, with regard to the control of stock, as contemplated in this proxy and power of attorney, and which have been denominated pooling agreements, are not necessarily void as being against public policy. In the case of Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847, the court, while holding the agreement in that case void as against public policy, expressly holds that "this conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy, with a view to promote the best interest of all the stockholders. The propriety of the object validates the means, and must affirmatively appear."

The following are cases in which pooling agreements have been held valid: Brown v. Pacific Mail etc. Co., 5 Blatchf. 525, Fed. Cas. No. 2025; Smith v. San Francisco etc. R. R. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 47 Pac. 582; Mobile etc. R. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723; Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627.

No illegal purpose is manifest upon the face of this agreement, nor has any been alleged in the bill. It appears to be consistent with the purposes for which the company was created, and which continuance appears to be necessary for the advantage of all who are interested in the development of the property; it is expressly declared to be for the benefit of all who join in it. No stockholder is prevented from joining in this agreement, and no stockholder who has not availed himself of the opportunity to join in it is excluded from the benefit of it; no one appears to have been injured by it. The complainant [468] does not allege in what way he is damaged by its continuance; he, with about four hundred out of five hundred stockholders, executed it, and he alone of all the stockholders asks to have it revoked. We do not think he should be allowed to revoke it.

The decree should be affirmed.

Voting of Stock.—Agreements to control the future voting of stock are considered in the monographic note to Smith v. San Francisco etc. Ry. Co., 56 Am. St. Rep. 138-153. Any combination or device by which a number of stockholders combine to place the voting of their shares in the irrevocable power of another is contrary to public policy and voidable: Harvey v. Linville Imp. Co., 118 N. C. 693, 54 Am. St. Rep. 749, 24 S. E. 489. Compare Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 47 Pac. 582. A proxy to vote stock is always revocable, even when, by its terms, it is made irrevocable: Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

BOORUM v. CONNELLY.

[66 N. J. L. 197, 48 Atl. 955.]

CONSTITUTIONAL LAW — MUNICIPAL CLASSIFICATION.—There are two sorts of classifications known to the law for the purpose of determining whether a law regulating the internal affairs of municipalities is general or special: 1. The constitutional classification of municipalites into counties, cities, boroughs, towns, townships, and villages; and 2. The statutory or subclassifications of territory for the purpose of legislation, which are less than, or not included in, the constitutional classifications. (p. 471.)

CONSTITUTIONAL LAWS.—GENERAL LAWS, as contradistinguished from special or local laws, are laws that embrace a class of subjects or places, and do not omit any subject or place naturally belonging to such class. (p. 471.)

CONSTITUTIONAL LAW — GENERAL LAWS. — A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is a general, and not a special or local, law, without regard to the consideration that within the state there happens to be but one individual of that class or one place where it produces effects. (p. 471.)

CONSTITUTIONAL LAW—MUNICIPAL REGULATION.—Rules for determining the constitutionality of statutes relating to the internal affairs of municipalities apply only to statutory classifications adopted by the legislature to answer some purpose not within the constitutional classifications of counties, cities, boroughs, towns, townships, and villages. (pp. 471, 472.)

CONSTITUTIONAL LAW—MUNICIPAL REGULATION—ELECTION OF OFFICERS.—A statute requiring that all officers to be elected at any municipal or charter election in any city within the state shall be voted for and elected on a certain day in each year is a general law and constitutional, although it applies only to cities and changes the time of holding such elections. (p. 475.)

CONSTITUTIONAL LAW—STATUTES—COGNATE MATTER.—If the subject of legislation is of a general character, all matters reasonably connected with it, and appropriate to accomplish or facilitate the object of the act, may be embraced in it without infringing the constitutional interdict prohibiting the intermixing of such things as have no proper relation to each other. (p. 478.)

CONSTITUTIONAL LAW—TITLE OF ACT.—A constitutional requirement that the object of every law shall be expressed in its title is satisfied when the title fairly indicates the general object of the statute, although it does not indicate the means or method of attaining that object, and it is only in a plain case that a statute may be declared void because its title does not express the object of the law. (p. 478.)

CONSTITUTIONAL LAW—TITLE OF ACT—COGNATE MATTER.—If a statute is entitled "an act relative to the time of election and appointment and terms of office of officers elected or

appointed in cities," and it changes the time of year for the holding of such elections. A provision extending the terms of office of the several city officials until successors can be elected at the election provided for in the statute is cognate to the title of the statute, and may be constitutionally included in the act. (p. 478.)

S. Kalisch, for the relator and plaintiff in error.

T. N. McCarter, for the respondent and defendant in error.

201 DEPUE, C. J. On the argument before the supreme court and in this court the contention was that the act in question was unconstitutional, on which it was insisted in this court that the judgment of the supreme court was erroneous.

The main ground on which this contention was rested was that the act is special and local, regulating the internal affairs of cities, in contravention of article 4, section 7, paragraph 11 of the constitution. This constitutional provision interdicts private, local or special laws in a number of enumerated cases, among which is contained "regulating the internal affairs of towns and counties." It also provides that the legislature shall pass general laws providing for the cases enumerated in the paragraph, and for all other cases which, in its judgment, may be provided for by general laws.

As was said by Chief Justice Beasley, in Van Riper v. Parsons 40 N. J. L. 1, 10: "The purpose of this constitutional clause was not to limit legislation, but to forbid only the doing, by special or local laws, those things that can be done by general laws. The provision relates to the methods and not to the substance of legislation; and the substitution of general laws in the stead of those that are special or local, necessarily indicates the limits and extent of the prohibition; for as the mandate is to do, by general legislation that which is interdicted to special or local legislation, it seems unavoidably to follow that it is only those things that can be accomplished by the former method that are forbidden to the latter method." The chief justice also said in another part of his opinion, that "all legislation is based, of necessity, on a classification of its subjects, and when such classification is fairly made, and the legislation founded upon it is appropriate to such classification, such legislation is as legitimate now as it would have been prior to the amendments as to the constitution": Van Riper v. Parsons, 40 N. J. L. 8.

There are two sorts of classifications known to the law for

the purposes of legislation: 1. The common-law classification of municipalities into counties, cities, boroughs, towns, townships and villages. This classification is recognized by constitution: Const., art. 1, par. 19. The other classification is statutory, adopted by the legislature for the adjustment of what has been called subclassifications—that is, classifications of territory for the purposes of legislation less than, or not within, the common-law classifications.

The first time that Van Riper v. Parsons, 40 N. J. L. 1, was before the supreme court it was held that, within the sense of these prohibitory clauses a general law, as contradistinguished from one special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. The second time that case passed under judicial examination the holding was that a law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law, without regard to the consideration that within this state there happens to be but one individual of that class or one place where it produces effects: Van Riper v. Parsons, 40 N. J. L. 123. To the same effect is Rutgers v. Mayor etc. of New Brunswick, 42 N. J. L. 51.

These rules for determining the constitutionality of acts of the legislature relating to the internal affairs of municipalities apply only to statutory classifications which are adopted by the legislature to answer some purpose not within the range of the common-law classifications of counties, cities, boroughs, towns, townships, and villages.

Legislation applicable to all the counties or all the cities, or all the boroughs, towns, townships, or villages in this state, is not subject to the principle which has been mentioned, for the reason that they are common-law classifications recognized by the constitution. The law now in question is applicable to all the cities of this state.

As early as Anderson v. Trenton, 42 N. J. L. 486, decided November term, 1880, the distinction above referred to was recognized. A statute purporting to confer upon all cities having a population of not less than twenty-five thousand inhabitants the power to issue bonds to fund their floating

debt was held to be a special law, in violation of the constitution. In the course of his opinion, Mr. Justice Dixon said: "Doubtless a law embracing all the cities or all the townships would be constitutional; for these bodies, because of their marked peculiarities, are, by common consent, regarded as distinct forms of municipal government, and so constituting classes by themselves": Anderson v. Trenton, 42 N. J. L. 486, 487. In Fitzgerald v. New Brunswick, 47 N. J. L. 479, 487, 54 Am. Rep. 182, 1 Atl. 496, 501, it was held by the supreme court that, for the purposes of legislation in relation to the police department, cities constituted a class. In the course of his opinion Mr. Justice Reed discusses and disposes of some of the questions that were argued in this case. He said: "It is objected that the act does not apply to municipalities other than cities. It is remarked that there exists in the state some municipalities which, under the name of boroughs, have populations as great and interests as important as some municipalities incorporated under the name of cities; that in the charters of the former are clauses almost or entirely identical with that of the city of New Brunswick and other cities of the state in regard to the organization and control of the police department. This all appears to be true. It is therefrom argued that a classification which includes only cities is not valid in respect to legislation concerning a subject like this, which is common to both cities and boroughs. Could the point involved in this contention be now regarded as open for discussion, untrammeled by previous judgments, it would present, in my opinion, a question not easily resolved in favor of the classification. But the recognition of cities as a class for legislative purposes in respect to other subjects, as obviously common to both cities and boroughs as this, seems to have been too frequent to be now disregarded in this court. No subject would seem to be of more general and uniform importance to both cities and boroughs than that of assessments for local improvements. Yet the recognition of the validity of statutes in regard to this subject, [204] applying alone to cities, has been frequent." A number of cases to this effect were cited by the learned judge; it is not necessary to reproduce the citations here.

New Brunswick v. Fitzgerald, 48 N. J. L. 457, 487, 488, 8 Atl. 729, was affirmed in this court. On the argument here it was earnestly contended that the act in question was

not a general law, on the ground that it was based upon a defective classification. The opinion in this court was delivered by Chief Justice Beasley. The contention just referred to was disposed of by the chief justice in these words: "In the supreme court, so far as this point was concerned, the subject was disposed of on the ground that this classification had been so repeatedly recognized in judicial decisions and in acts of legislation as not to be open to further discussion, but that it was to be treated as res adjudicata. In that view this court entirely concurs." The opinion of the chief justice is given more importance by the fact that one clause in the section of the act which was quoted was held to be special, from the fact that there were words in it which limited the effect of it to cities where the police department held office quam bene se gesserint, which made the law, to that extent, special.

In In re Commissioners of Elizabeth, 49 N. J. L. 488 10 Atl. 363, it was held that, for the purposes of legislation, cities constitute a class, and a law applicable to cities only is not in contravention of the constitution. The legislation under consideration in this case was the well-known Martin act, the provisions of which would be equally appropriate to boroughs, towns, and townships as to cities. This case was recently affirmed in this court. An act applying to every county in the state, empowering the board of chosen freeholders to perform certain duties in relation to public roads, has been held to be constitutional: Miles v. Freeholders of Bergen, 32 N. J. L. 302, 19 Atl. 718. The principle adjudged in the foregoing cases is sustained by all the decisions, without a single dissent: Noonan v. County of Hudson, 52 N. J. L. 398, 20 Atl. 255; Bowyer v. Camden, 50 N. J. L. 87, 11 Atl. 137; State v. Borough of Clayton, 53 N. J. L. 277, 21 Atl. 1026.

In Johnson v. Asbury Park, 58 N. J. L. 604, 33 Atl. 850, an act respecting licenses in boroughs of this state was held by the supreme [205] court to be constitutional. It was argued against the validity of that statute that no reason could be given for granting certain special powers to one class of the municipalities and withholding them from other classes. This argument was discredited, and it was held that the division of municipalities into cities, towns, townships, and boroughs, being a classification permitted by the constitution for the purposes of local government, powers to be conferred upon these bodies severally, which pertain to the ordinary functions

of local government, must rest in legislative discretion. The act in question in that case applied only to boroughs. The judgment was affirmed in this court: Johnson v. Asbury Park, 60 N. J. L. 427, 39 Atl. 693. It was there held that "legislation empowering boroughs to license certain trades and occupations, and to raise revenue by such license fees, is not obnoxious to the constitutional prohibition against special legislation, because it does not apply to other municipalities of higher or lower degree."

In Crookall v. Matthews, 61 N. J. L. 349, 39 Atl. 659, affirmed in this court, 62 N. J. L. 799, 42 Atl. 1051, it was decided that townships form a proper class for legislation affecting the term of office of assessors. This decision was also rested on the principle that towns, townships, boroughs, and cities in legislation are treated as municipalities belonging to different classes; hence an act of the legislature which applies to one class only is, within the meaning of the constitution, a general law. An act relating to the improvement of streets and the construction of sewers in the cities of this state was held to be a general law, although it applied only to cities: Jelliff v. Newark, 48 N. J. L. 101, 2 Atl. 627. In the prior case of Green v. Hotaling, 44 N. J. L. 347, an act providing for assessment for the construction and continuation of sewers, which applied to cities only, was held to be constitutional. The decision in this case was affirmed in this court: Green v. Hotaling, 46 N. J. L. 207.

Finally, in Hermann v. Town of Guttenberg, 63 N. J. L. 616, 621, 624, 44 Atl. 758, it was decided by this court that incorporated cities, boroughs, towns and villages, as well as townships, are recognized by the constitution as classes for legislation, and that [206] laws limited to either of such classes do not violate the constitutional prohibition of private, local or special laws. It was also decided that the courts cannot inquire whether a municipality, or class of municipalities is titular only, and that the classification of the legislature in that regard is conclusive. The decision of this court in this respect was designed to be decisive on this subject. Mr. Justice Collins, in his opinion, after citing and discussing the antecedent cases, uses this language: "These adjudications lead to a comprehensive decision in favor of the constitutional right of the legislature to classify towns by their style of incorporation, at least to the extent hereinafter to be stated,

and for such a result there seems to be sound reason." The learned justice alludes to legislation as to cities, towns, townships, etc., in which the acts contained in statutes having such a title have been declared unconstitutional; but he declares that that result was due to the fact that the provisions contained in such acts were invalid because of unwarranted classification. He adds: "Whether or not these laws be valid, no possible exception can be taken to a law that brings in all of a class."

It will be observed that in all these cases the legislation sustained applied to some one of the common-law classifications, and that the subject matter of such legislation would have been as appropriate to other subdivisions as to those specifically embraced in it. Such acts of the legislature are, in a constitutional sense, general laws.

The act now in question requires that all the officers to be elected at any municipal or charter election shall be voted for and elected on the first Tuesday after the first Monday of November in each year. The act applies to all the cities in this state. The court has been furnished with a list of the cities, with the population of each, and also of the towns, townships, and boroughs of the state with a population of over three thousand. It appears from this schedule that in the different counties of this state there are towns, townships, boroughs, etc., each containing a population in excess of some of the cities in the same county. If the classification [207] in such cases were statutory, that fact would be decisive if this legislation were based upon the statutory classification. But it is not. The classification of cities, towns, townships, boroughs, and villages is a classification independent of statutory prescriptions. It rests on the common law, and it is recognized by the constitution of this state; hence, an act of the legislature which applies to any one of these political subdivisions is a general law, not obnoxious to that provision of the constitution which prohibits local or special laws regulating the internal affairs of cities, etc.

The subdivision of the common-law municipalities into subordinate classes is a legislative classification, and legislation with respect to any of such classes depends upon the appropriateness of such legislative classification. Classification acts have been passed dividing cities, towns, townships, boroughs, and villages into classes on the basis of population. The of-

fice of these classification acts is simply to provide a rule of construction for municipal legislation. A statute framed in compliance with such acts will be construed accordingly, and upon such a construction the question will arise whether the classification adopted is such, in substance, as to bring the statute within the category of general laws. They are statutes for interpreting enactments concerning municipalities. Beyond this effect, legislation conforming to such subdivisions is incapable of exercising any force or controlling effect upon either the legislature or the courts. In all such cases the validity or invalidity of the statute which is the product of these classifications depends upon those considerations which will confer upon a statute, local and special on its face, the quality of a general law: Warner v. Hoagland, 51 N. J. L. 62, 16 Atl. 166; Calvo v. Westcott, 55 N. J. L. 78, 25 Atl. 269; Wanser v. Hoos, 60 N. J. L. 482, 525, 64 Am. St. Rep. 600, 38 Atl. 449; Foley v. Hoboken, 61 N. J. L. 478, 481, 38 Atl. 833.

In Mortland v. Christian, 52 N. J. L. 521, 537, 20 Atl. 673, Mr. Justice Garrison, delivering the opinion of this court, in a case where the legislation was directed to counties of the first class, said: "That the counties to be affected are referred to as of the first class does not touch the constitutionality of the act, if its subject matter be one having a natural relation to population. [208] The cases of Randolph v. Wood, 49 N. J. L. 85, 7 Atl. 286, 50 N. J. L. 175, 15 Atl. 271, Paul v. Gloucester County, 50 N. J. L. 585, 15 Atl. 272, and notably Warner v. Hoagland, 51 N. J. L. 62, 16 Atl. 166, have put this subject at rest, and delimit the functions of the classification act." In Wanser v. Hoos, 60 N. J. L. 482, 525, 64 Am. St. Rep. 600, 38 Atl. 448, it was said that "the question whether any particular statute is local or special must be determined, not upon its compliance with a legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law as defined by the courts." Wanser v. Hoos, 60 N. J. L. 482, 525, 64 Am. St. Rep. 600, 38 Atl. 448, and Lowthorp v. Trenton 62 N. J. L. 795, 44 Atl. 755, are instances of legislation based upon a subclassification. In the first case the legislation applied only to cities of the first class; in the other case it applied only to cities of the second class. In both cases the statute was held to be unconstitutional, for

the reason that, as applied to the subdivisions of cities, the act was local and special. These cases, contrasted with Fitzgerald v. New Brunswick, 47 N. J. L. 479, 54 Am. Rep. 182, 1 Atl. 496, Johnson v. Asbury Park, 58 N. J. L. 604, 33 Atl. 850, and Herman v. Guttenberg, 63 N. J. L. 616, 44 Atl. 758, illustrate the principle which has uniformly controlled the courts in deciding upon the constitutionality of statutes which apply to the internal affairs of municipalities. In such legislation cities, boroughs, towns, townships, and villages are each a distinct class, within the constitutional intent, and laws applicable to either of these subdivisions are general and not special or local, and such legislation is, per se, constitutional, although the subject matter of it may be appropriate as well to other places. On the other hand, with respect to the subdivisions of these common-law municipalities, the subdivision being a legislative act, the constitutionality of laws relating to either or any of them is determined by the sufficiency of such classifications, having regard to the subject matter of the legislation.

Nor is this act obnoxious to the constitutional prescription which provides that "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace [209] but one object, and that shall be expressed in the title": Const., art. 4, sec. 7, pl. 4.

The title of the act in question is, "An act relative to the time of election and appointment and terms of office of officers elected or appointed in cities in this state." It is only in a plain case that a statute will be declared void because its title does not express the object of the law: State ex rel. Richards v. Hammer, 42 N. J. L. 435. In the case last cited, in a statute under the title of "An act relating to the assessment and revision of taxes in cities of this state," it was held to be competent to include provisions changing the mode of appointing members of boards of assessment and revision. Where the subject of legislation is of a general character, all matters reasonably connected with it, which are appropriate to accomplish or facilitate the object of the act, may be embraced in it without infringing the constitutional interdict which prohibits the intermixing of such things as have no proper relation to each other: In re Commissioners of Elizabeth, 49 N. J. L. 488, 10 Atl. 363. "The constitutional requirement that the object of every law shall be expressed in its title is satisfied when

the title fairly indicates the general object of the statute, although it does not indicate the means or method of attaining that object": Bumsted v. Govern, 47 N. J. L. 368, 1 Atl. 835.

In giving effect to this clause of the constitution the courts give paramount consideration to the general object of the act. The general object of the act being ascertained, the legislature may include in it provisions of multiform character, designed to carry into execution the legislative purpose, which are not inconsistent with or foreign to the general object of the act. Thus, under an act entitled "An act to cede to the mayor and common council of Jersey City certain lands of the state now and heretofore under the tidewaters of Communipaw bay, and to establish a tide-water basin adjacent thereto," it was held that the grant to Jersey City of that part of it next to the city, with a duty to improve the same for a basin, with power to erect wharves and to regulate and control the use of such basin and wharves, and to charge dockage and wharfage, and the dedication of [210] the residue of the tract for a public basin, might be embraced in one act—the grant of one part to the city and the dedication of the other to the public being simply means to carry into execution the general object of the legislative scheme: Easton etc. R. R. Co. v. Central R. R. Co., 52 N. J. L. 267, 19 Atl. 722.

The object of this statute was to change the time of the holding of elections for local officers in the cities of this state from the spring to the fall. Every provision contained in it is cognate to the subject matter of this legislation. In Warner v. Hoagland, 51 N. J. L. 62, 16 Atl. 166, under an act entitled "An act concerning the construction, care, and improvement of the public ways, parks, and sewers in certain of the cities of this state, and assessment for the same," powers over this subject were conferred upon the common council or board of aldermen. A section of the statute provided that the office of every officer, commission, or board possessing any of the powers mentioned in the act should cease, determine, and be abolished. It was held that abolishing the offices of other officers having the jurisdiction and powers conferred on the common council or board of aldermen was cognate to the object of the act, and that the purpose to abolish such offices need not be expressly mentioned in the title of the act. By a parity of reasoning, the extension of the terms of office of the several

city officials until successors could be elected at the election provided for is cognate to this legislation, and is embraced in the title.

Finding no infirmity in this legislation, on constitutional grounds, the judgment of the supreme court should be affirmed.

In the Case of Lewis v. Jersey City, 66 N. J. L. 582, 50 Atl. 346, the court reiterated the rule as expounded in the principal case, that for the purposes of legislation regulating the internal affairs of municipal corporations there are two sorts of classification known to the law, the constitutional and the statutory, and expressed the opinion that a system of classification which merely individualizes the political districts of the state to which the act shall apply is insufficient and unconstitutional, as something more is required than mere designation by such characteristics as would serve to merely identify. The classification must be placed on some characteristic or peculiarity which plainly distinguishes the places to be included from the places excluded, and make the legislation appropriate to the former alone, and it must include all and exclude none whose condition and wants render such legislation equally appropriate to them as a class. Hence a statute to provide a system of public instruction providing a different system of government in schools in municipalities which are divided into wards from that in those not so divided is unconstitutional, as being a private or special law regulating the internal affairs of cities, towns, or counties, and the management and support of public schools. Such a classification is simply a description identifying places to which legislation is intended to apply, and possesses none of the characteristics which are essential to the validity of a law regulating the internal affairs of a municipal corporation. In support of these views the following cases were cited: State v. Hammer, 42 N. J. L. 435, 440; Rutgers v. New Brunswick, 42 N. J. L. 51; Van Giesen v. Bloomfield, 47 N. J. L. 442, 2 Atl. 249; Wood v. Atlantic City, 56 N. J. L. 232, 28 Atl. 427; Atlantic Waterworks Co. v. Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581; Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; Boorum v. Connelly, 66 N. J. L. 197, ante, p. 469, 48 Atl. 955; McArdle v. Jersey City, 66 N. J. L. 590, post, p. 496, 49 Atl. 1013.

Special and Class Legislation is considered in the monographic note to State v. Ellet, 21 Am. St. Rep. 780-789. It is sufficient, under a constitutional provision prohibiting local or special legislation, if a law applies to all persons in like situation, and to all subjects of the same class or degree: Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. The legislature may, by a general law, classify counties and other municipalities on the basis of the population therein: Knopf v. People, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22. Classification on such basis in a statute relating to the machinery and powers of municipalities is legitimate, if the population bears a reasonable relation to the necessities of the municipalities. The judgment of the legislature in such cases must prevail, unless the classification is plainly illusory or applied illusively: Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, and cases cited in cross-reference note thereto, 38 Atl. 449; McArdle v. Mayor, 66 N. J. L. 590, post, p. 496, 49 Atl. 1013. An act in relation to cities of the second class is not an abuse of the power of classification, although it was intended to apply only to three exist-

ing cities: Commonwealth v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801, 49 Atl. 351. But if a statute providing for the annexation of cities can in no event become operative upon but a single city by reason of conditions specified therein, it is special legislation, and void: State v. Des Moines, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818.

The Titles of Statutes, as to their sufficiency within the constitutional requirements, are considered in the monographic notes to Bobel v. People, 64 Am. St. Rep. 70-107; Crookston v. County Commrs., 79 Am. St. Rep. 456-486; Lewis v. Dunne, 86 Am. St. Rep. 267-279.

SALISBURY v. ERIE RAILROAD COMPANY.

[66 N. J. L. 233, 50 Atl. 117.]

RAILROADS—LIABILITY FOR NEGLIGENCE OF FOREMAN.—If a railroad company places a push car in the hands of its foreman, to be used upon its road for the purpose of removing waste railroad ties and the foreman loans the car to one of the laborers under him to take away some of the ties for his own use after his day's work is done, the company is liable to a third person who is injured, while lawfully upon the track, by the negligence of the laborer while thus using the car. (pp. 480, 482.)

RAILROADS—NEGLIGENCE OF FOREMAN.—If a railroad company places a push car in the hands of its foreman, to be used upon its track, it is the duty of the foreman to use it with reasonable care to prevent injury to anyone lawfully upon the track and to keep it under his own supervision until it is returned to the company. For the performance of such duty by the foreman the railroad company is bound, and the failure of the foreman to perform is the failure of the company. (pp. 482, 483.)

NEGLIGENCE—OMISSION OF DUTY.—If an injury is done by the omission of some duty which the defendant is under obligation to see performed, the omission to perform fixes the liability, and the relation between the parties is immaterial. (p. 484.)

RAILROADS—NEGLECT OF DUTY.—Railroad companies may become liable for injury caused by neglect of duty resting upon them, independent of the relation of master and servant. (p. 484.)

J. W. Griggs, for the plaintiff in error.

J. H. Lefferts and P. R. Lefferts, for the defendant in error.

233 VAN SYCKEL, J. Thomas Salisbury, the plaintiff below, while lawfully crossing the railroad of the defendant company, in November, 1897, at about 7 o'clock in the evening, was struck by a push car, which an Italian was pushing upon and over the railroad track. This suit was brought by

Salisbury against the railroad company to recover damages for the injury he received by the alleged carelessness of the Italian in the use of the push car.

It appeared in evidence that George McNamara was foreman of a section of the defendant company's railroad. His duty was to keep his section of the road in good repair and good order, so that trains could pass over it in safety. On the day of the accident he was engaged with a gang [234] of men, of which the Italian was one, in removing old ties from the track and replacing them with new ones. The company furnished him the push car to carry himself and his men on the railroad track to the place where the ties were to be removed. After the old ties were taken out, the foreman had the right to give them away, and if he did not do so, he was required to pile them up along the track and burn them.

On the day of the accident, after the day's work was done, he gave some of the ties to the Italian, and, at his request, loaned him the push car to take the ties over the track to his home. While the Italian was on his way to return to the foreman the push car, after using it for this purpose, the injury to the plaintiff was done.

The evidence showed that the company had instructed the foreman to run the push car with great caution, always looking out for trains, not to run it within twenty minutes before passenger trains were due, and not to permit it to be used unless accompanied by the foreman, nor to run it after dark without special authority from the superintendent of the road. The injury in this case occurred while the Italian was running it after dark. At that time the employment of the Italian by the company was at an end, and he cannot be regarded as the servant of the company.

If a master lends his wagon to his servant to carry the servant's property over an ordinary public highway, no one would seriously contend that, while the servant was engaged in his own business, the master would be liable for any injury which resulted from the negligence of the servant. It would not be an injury done in the service of the master, and the master would be under no duty to the public to maintain the safety of the highway. But the railroad company was under a duty to maintain its tracks and the appliances used upon them with reasonable care to protect from injury persons who were law-

fully passing over the tracks, or who were being transported upon them.

In Smith v. New York etc. R. R. [235] Co., 46 N. J. L. 7, the company's cars were left on a switch, which inclined toward the main track, the same being secured by the brakes and by a railroad tie under the wheels. The cars got upon the main track and caused the injury to the plaintiff. Chief Justice Beasley delivered the opinion of the supreme court, holding that the company was not irresponsible as a matter of law, even though the cars could not have got on the main track but for the wrongful act of a stranger.

In Delaware etc. R. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214, the present chief justice, speaking for this court, said that, although the railroad, by its charter, is declared to be a public highway, the company was liable for injuries by fire thrown from the locomotives of another company which the defendant company permitted to be run on the road, its defective condition being known to the defendant's train dispatcher.

The court further said that the track and roadbed were the property of the defendant, and in its possession, and the gist of the action was negligence in the manner in which it was used. If liable for such injury to abutting property, the company must be liable for due care for the safety of persons lawfully passing over its tracks. There is, therefore, no analogy between an ordinary public highway and a railroad track, and the liability which arises upon the latter has no relation to the former.

In the case sub judice no responsibility of the defendant company can be predicated upon the relation of master and servant between the Italian and the company, as no such relation existed at the time of the alleged negligence. The judgment against the company must rest exclusively upon the failure of the company to perform a duty which it owed to all persons lawfully upon its track in the exercise of due care for their own safety, which failure was due to the act of its servant and agent, McNamara, in loaning the push car to the Italian.

The Italian had ceased to be the agent or servant of the company, but the foreman was still its agent and servant. [236] When the company placed the push car in the hands of the foreman, it was the duty of the foreman to use it with reasonable care to prevent injury to anyone lawfully on the tracks,

and to keep it under his own supervision until it was returned to the company. For the performance of that duty by the foreman the company was bound, and the failure of the foreman to perform it was the failure of the company. The company cannot claim immunity on the ground that its servant violated the instructions given to him any more than it could set up in defense that an engineer had violated the express instructions given to him to ring the bell at a public crossing.

The twenty-ninth section of the railroad law (Gen. Stats. 2645) provides that the penalty for failing to ring the bell or sound the whistle shall be paid by the corporation owning the road. The obligation to see that the duty is performed is cast upon the owner of the road. The safety of the public demands that the company shall be strictly held to its performance.

If the engineer in charge of a train of cars, after he reaches his destination, should lend his train to a friend to take a run upon the road, could it be questioned that for any injury which resulted from its negligent use the company would be responsible?

The relation of master and servant would not exist between the borrower and the company upon which to base its liability, but the action would rest upon the responsibility of the company for the observance of due care in the use of the train by its engineer.

In Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695, the plaintiff was a passenger in defendant's stage-coach. The driver of the coach placed the lines in the hands of a passenger, and while the passenger was driving, the plaintiff was injured through his negligence. The court held the proprietor of the stage-coach liable for the injury. The passenger could not be regarded as the agent of the proprietor, because the driver was without authority to employ the passenger, or make him the agent. [237] The recovery rested entirely upon the duty of the master to see that reasonable care and skill were used in driving the coach.

In Lakin v. Oregon Pac. R. R. Co., 15 Or. 220, 15 Pac. 641, the plaintiff was injured, while a passenger on the defendant's railroad, by the negligence of one Blackburn, who was placed upon the engine by Fordyce, an agent of the company, who had no right to employ him.

The court said it made no difference whether the injury resulted from the negligence of Blackburn or the wrong of Fordyce in placing him on the engine. The obligation was to

carry the passenger safely, and if it failed to perform its obligation, in consequence of the act of Fordyce, one of its employés, the company became responsible for the injury.

So in the case now under consideration, the duty rested on the company to see that its servant used the push car with due care, and the foreman could not discharge the company from that responsibility by wrongfully putting the car in the hands of the Italian to run upon the road.

In Philadelphia etc. R. R. Co. v. Derby, 14 How. 468, Mr. Justice Grier held that the company, by intrusting its servant with a dangerous engine assumed the risk of its careless use, and he cites, with approbation, the case of Sleath v. Wilson, 9 Car. & P. 607, where the servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place, and instead of doing so, he went to another place on his own business, and while so engaged injured the plaintiff. The master was held liable. In that case, Mr. Justice Erskine said: "It is quite clear that if the servant, without his master's knowledge, takes his carriage out of the carriage-house and commits an injury, the master is not liable, but it is on the ground that the master has not intrusted the servant with it. When the master has intrusted the servant with the control of the carriage, it is no answer that the servant has acted improperly in the management of it. [228] In such case, the master will be liable on the ground that he has put it in the servant's power to mismanage by intrusting him with it to go on the master's business."

It is a general rule that where an injury is done by the omission of some act of care which the defendant is under a duty to see performed, the fact of the omission to perform it fixes the liability, and the relation between the defendant and the person who has failed in the due care is immaterial.

In Cuff v. Newark etc. R. R. Co., 35 N. J. L. 24, 10 Am. Rep. 205, Mr. Justice Depue clearly states the rule that railroad companies may become liable for injuries occasioned by neglect of duty resting upon them, independent of the relation of master and servant, and cited cases in support of it. Where a wrongful act is committed by another, the relation between him and the person who is sought to be made responsible, of course, becomes important.

In this case the relation between the Italian and the defendant company is of no consequence. The question was whether there was an omission on the part of the company to discharge

the duty which it owed to the plaintiff to see that reasonable care was observed in the use of the push car on its road. That question was properly submitted to the jury by the trial judge.

At the close of the plaintiff's testimony the counsel for the company requested the court to direct a verdict for the defendant. The only exception taken was to the refusal of the trial court to grant that request. In that there was no error.

The judgment below should be affirmed.

If a Railroad Company Intrusts Its Hand-car to a section foreman, it does not thereby become liable for an injury to a person at a public crossing, caused by a collision with the hand-car through the negligence of the foreman while operating the car on his private business, not in the line of the operation of the railroad, nor in the performance of a duty to the company, and in violation of its orders: Branch v. International etc. Ry. Co., 92 Tex. 288, 71 Am. St. Rep. 844, 47 S. W. 974. See, in this connection, Houston etc. Ry. Co. v. Bolling, 59 Ark. 395, 43 Am. St. Rep. 38, 27 S. W. 492.

On the Liability of a Master for the acts of his servant, see the monographic notes to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 71-93; Ware v. Barataria etc. Canal Co., 35 Am. Dec. 192-201; and the recent cases of McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; Brown v. Boston Ice Co., 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644; Guille v. Campbell, 200 Pa. St. 119, 86 Am. St. Rep. 705, 49 Atl. 938.

On Who is a Vice-principal, see the monographic note to Mast v. Kern, 75 Am. St. Rep. 584-640.

THOMPSON v. TAYLOR.

[66 N. J. L. 253, 49 Atl. 544.]

MARRIED WOMAN'S CONTRACT—CONFLICT OF LAWS. An accommodation note made and delivered by a married woman to her husband in a state where they are domiciled, and by him taken to another state, and there indorsed and delivered by him in exchange for other notes of similar character, is a contract made in the latter state, and the capacity of the wife to bind herself by a contract of suretyship is to be determined by the law of that state. (p. 485.)

CONTRACTS OF MARRIED WOMEN, if valid in the state where made, may be enforced against them in another state, though, if originally made in the latter, they would be void. (p. 490.)

Action on a note made and executed by a married woman for the accommodation of her husband without limitation while they were both domiciled in New Jersey. The husband after the execution of the note in New Jersey took it to the

state of New York, where he indorsed and transferred it to the plaintiff in payment of two similar notes transferred by such husband to plaintiff for cash. Judgment for defendant and plaintiff appealed.

R. P. Wortendyke and C. L. Corbin, for the plaintiff in error.

G. W. Betts, Jr., for the defendant in error.

255 GARRISON, J. The note in suit was not a New Jersey contract. The parties to it in this state were husband and wife. By force of section 14 of our married women's act there is in this state no law to enable husband or wife to contract with each other, excepting as at common law: Gen. Stats. 2015; Woodruff v. Apgar, 42 N. J. L. 198; Turner v. Davenport (N. J. Eq.), 47 Atl. 766. Hence the written promise of the wife to pay a sum of money to the order of her husband, signed by her and delivered to him in the state of New Jersey, did not constitute a contract. When, therefore, the note left this state no legal contract was in existence: National Bank of Rahway v. Brewster, 49 N. J. L. 231, 12 Atl. 769. In New York the above-mentioned feature of the common-law rule has been expressly superseded by an enabling act that empowers a married woman to contract with her husband to the same extent and in the same form as if unmarried.

The husband, therefore, having in his possession, in the state of New York, his wife's note, intrusted to him under the circumstances certified in this case, had the means of making for her a contract of suretyship that would be valid by the law of the place where it came into legal existence and where it was to be performed. By his indorsement and delivery of the signed note the wife was as effectually bound to the payee as if she had personally executed the note in the state of New York.

Where a note is signed in this state, but is passed away and comes first into legal existence in the state of New York, 256 in contemplation of law it was made in the latter jurisdiction: Campbell v. Nichols, 33 N. J. L. 82. The note, therefore, is a contract made in the state of New York, upon the facts certified, without reference to the legal rule that a note made payable at a particular place is to be treated in all respects as if made at that place, for which abundant authority is cited in the brief of the plaintiff's counsel.

To the next proposition of the plaintiff, viz., that such a contract made in New York and valid by its laws will be enforced

by the courts of New Jersey, two objections are raised: 1. That the incapacities of a wife, under the common law, if not removed by the statute law of her domicile, follow her wherever she goes, so that if at home she be unable to bind herself as surety, she may nowheres bind herself by such a contract; secondly, that the retention in our law of so much of the common law as prevented married women from becoming sureties is a declaration by the legislature of a public policy, to which the courts should give effect by refusing to enforce obligations of this nature incurred by its citizens in other states where this disability no longer exists.

Both of these points are taken in the brief of counsel for the defendant, and each of them receives some support from the opinion delivered in the supreme court, although the actual decision of the case is rested upon the second ground, viz., that of public policy.

It will be necessary, therefore, to consider each of these propositions. The first claim is that the capacity of a married woman to make a contract of suretyship is governed by the law of her domicile, and not by the law of the place where the contract is made and where it is to be performed. In other words, that capacity to contract is governed by the law of domicile, and not by the lex loci contractus. The discussion of this question by the civilians and in early judicial writings occupied much space and received the closest attention from Mr. Justice Story as one in which the doctrines of the civil law could not be made to harmonize with the commercial rule upon the subject. It is rarely worth while to search back of Story upon such a question, especially if he has decided [257] against the civil law rule. In his "Commentaries upon the Conflict of Laws," after a comprehensive review of the authorities, Mr. Justice Story reached the conclusion that, in regard to the incapacities incident to coverture and other personal disabilities to contract, "the laws of the domicile of birth or the law of any other acquired and fixed domicile is not generally to govern, but the lex loci contractus aut actus, the law of the place where the contract is made or the act done": Story's Conflict of Laws, 103.

In the course of his consideration of this and kindred questions Mr. Justice Story quotes so frequently from the civilians that, upon a hasty reading, the opinions of those jurists may be taken for his own, but there can be no question as to the commentator's final summary, viz., that "although foreign

jurists generally hold that the law of domicile ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine—namely, that the lex loci contractus is to govern": Story's Conflict of Laws, sec. 241.

With respect to another American commentator, Chancellor Kent, it is both interesting and important to observe that, while in some parts of the text of his commentaries he seems to favor the arguments of the foreign jurists, yet in his later notes he unequivocally states the rule to be: "The state and condition of the person, according to the law of his domicile, will generally, though not universally, be regarded in other countries as to acts done, or rights acquired, or contracts made, in the place of his native domicile; but as to acts, rights, or contracts done, acquired or made out of his native domicile, the lex loci will generally govern with respect to his capacity and condition": 2 Kent's Commentaries, 233, note c.

To the same effect is the opinion of Chief Justice Gray, of Massachusetts, delivered in the case of Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, where, after considering the whole question, he decides that "the validity of a contract, even as regards the capacity of the parties, is to be determined by the law of the state where it is made."

I have no difficulty in reaching the conclusion that the capacity of Mrs. Taylor to enter into a New York contract in 258 New York was governed by the laws of New York, notwithstanding her domicile was in New Jersey; and that the contract into which she there entered was valid and binding upon her.

If we pass to the reason assigned in the advisory opinion, we shall see that it rests upon the doctrine of our courts: That a contract valid elsewhere will not be enforced if it is inconsistent with the public policy of the jurisdiction, the aid of whose tribunals is invoked for the purpose of giving it effect.

The decisive portion of the opinion of Mr. Justice Gummere is in these words: "When the legislature has declared the policy of the state in relation to a given subject matter, it is the duty of the courts to give effect, so far as possible, to that policy," citing Felt v. Felt, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, and Union Locomotive Co. v. Erie Ry. Co., 37 N. J. L. 23.

There can be no doubt as to the duty of our courts under the condition thus predicated. The question in the case is whether the legislation referred to in the opinion is a declara-

tion of public policy. Briefly summarized, that legislation confers upon married women rights to contract as if unmarried, save as to contracts of suretyship from which no benefit is obtained from their separate use: Gen. Stats., p. 2017, sec. 26.

In my judgment this and kindred acts of legislation, constituting together our married women's act, and passed under the titles of "An act for the better securing of the property of married women," and "An act to amend the law relating to the property of married women," are to be regarded as regulations rendered necessary by the abrogation of the principles of the common law concerning coverture; and that what is indicated by this legislation, as a whole, is the abandonment of a public policy upon the subject and the future regulation of it by acts of legislative discretion.

The distinction between regulative legislation and the adoption of a principle of public law is too important to be lost sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. When, however, civilized states became satisfied [259] that the welfare of society was not best served by the maintenance of this principle, it was abandoned, by the recognition of its opposite, viz., that married women possessed capacity to contract. The questions that then arose, viz., what contracts might they make, and what might they not, while calling for the exercise of legislative discretion, based upon considerations that affected a large class of individuals, did not, either in theory or in fact, involve any principle upon which the general welfare of the body of citizens of the state was assumed to rest. With the abandonment of the political principle, the matter was broken up into discretionary exercises of legislative regulation, in the course of which different bodies, or the same legislative body at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse. Thus, in the case certified it appears that the state of New York, having abandoned the principles of the common law, as we ourselves have done, has gone further in its enabling legislation, or, what is the same thing, has retained less of what the common-law rule compelled, but equally and in either case the only principle involved has been abandoned. The respective regulations of the subject equally

rest upon the common ground that women have a capacity to make contracts, subject to legislative control. If this be so, comity requires that we mutually give effect to these discretionary acts by recognizing the validity of the resulting contracts and enforcing them in our courts, even when they are in opposition to our own declared discretion upon the subject. This, as I read the case of Wright v. Remington, 41 N. J. L. 48, 32 Am. Rep. 180, has been categorically decided in our supreme court. In that case a wife signed two notes as surety for her husband in Illinois, where the common law had been abrogated to that extent. Suit was brought in our circuit court to enforce these contracts against the wife. Upon a case certified the supreme court held that comity required the enforcement of the notes in question.

In delivering the opinion of the court, Mr. Justice Reed said: "There can be no question but that the contract was valid by the law of Illinois. It is, therefore, the duty of the [260] courts of this state to recognize and enforce it, unless it appears injurious to the interests of the state or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign state confers upon married women the power to make a contract of suretyship. Whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality, or attacks the interests of the body of the citizens of our state."

Objection upon this point was apparently not renewed upon the writ of error in this court, for the judgment was here affirmed without again referring to it: Remington v. Wright, 43 N. J. L. 451. This case, upon the point now in controversy, states the correct rule of law so definitely that it should have been followed in the supreme court.

If, as was suggested upon the argument, the device of providing a place of performance in a foreign jurisdiction, or even of making the actual contract in a place where the wife was empowered to contract directly with her husband, should be urged as a ground for sustaining such a contract here, or for enabling the husband to sue thereon in our courts of law, a different question would be presented. It may well be that such a proceeding would run athwart the settled policy of our law with respect to the supervision exercised by equity over the engagements of married persons, which is retained in our

system of jurisprudence by the fourteenth section of the married women's act. With respect to this question no opinion is expressed.

For the reasons given the judgment of the circuit court, entered in accordance with the advisory opinion of the supreme court is reversed.

The Validity of a Contract Between Husband and Wife is generally determined by the law of the place where it is made, and if valid there it is valid everywhere: See the monographic note to Locke v. McPherson, 85 Am. St. Rep. 574, on conflict of laws as affecting the rights and obligations of married women: Union Nat. Bank v. Chapman, 169 N. Y. 538, post, p. 614, 62 N. E. 672.

TUTTLE v. ATLANTIC CITY RAILROAD COMPANY.

[66 N. J. L. 327, 49 Atl. 450.]

NEGLIGENCE—INJURY IN EFFORT TO ESCAPE FROM SUDDEN PERIL.—If a person, seeing a car which has been negligently derailed coming across the street at full speed toward where he is standing, and becoming frightened runs for safety and falls, receiving an injury, he is entitled to recover from the owner of the car therefor. (pp. 492, 493.)

NEGLIGENCE—SUDDEN PERIL—EFFORT TO ESCAPE FROM—DAMAGES.—If a person, by negligence, puts another under a reasonable apprehension of personal physical injury, and such other, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for such injury, and the mental disorder naturally incident to its occurrence. (p. 495.)

J. W. Morgan and C. V. D. Joline, for the plaintiff in error.

H. S. Scovel and W. T. Boyle, for the defendants in error.

328 VROOM, J. The writ of error in this cause brings up the record of a suit brought in the supreme court and tried at the Camden circuit court. The defendant, the Atlantic City Railroad Company, maintained a freight yard on the south side of Mechanic street, in the city of Camden, and on the twenty-fifth day of September, 1899, while a flying-drill was being made, one of the cars was derailed and dashed across Mechanic street, over two curbstones and two trolley tracks, and broke through the front of the house opposite, No. 293, belonging to a Mrs. Brennan. At the time of the accident Mrs. Tuttle, one of the plaintiffs, was on the sidewalk near the Brennan house, and looking she saw the car coming across the

street at full speed; becoming frightened at the noise, she started to run, and when three or four doors below fell and injured her left knee.

At the close of the plaintiffs' case a motion for a nonsuit was made on the part of the defendant, upon the ground that if any negligent conduct had been proved on the part of the defendant by reason of this car having gotten away from where it belonged, the plaintiff was guilty of contributory negligence in going away from a place of safety to a place of insecurity; that she was at a safe distance from the car, and there was no occasion for her to remove from it. The testimony, however, of the plaintiff was that she was in front of Mrs. Brennan's door, or had just passed it, when she saw the car coming over, and it was further disclosed by the testimony that this car, in coming across the street, was not running on any track. Is it reasonable even to suppose that the plaintiff could have had any means of knowing the direction the car would take? She was rightfully on the street, and the unusual sight of a car crashing across the street at [329] full speed precluded any possibility of reflection as to the best thing to do. Acting under the impulse of fear, she ran, and just as the car crashed into the Brennan house she fell. The motion to nonsuit was denied, and the trial resulted in a verdict for the plaintiffs.

The real question in issue in the case and to be determined by the jury was whether the plaintiff (Mrs. Tuttle), seeing the car approaching at great speed across this street, was justified in running to escape from what she supposed was an imminent danger.

In the case of Stokes v. Saltonstall, 13 Pet. 181, which was an action brought to recover damages sustained by the wife of the plaintiff by the upsetting of a stage-coach in which she was a passenger, the question was whether the stage was upset by the negligence of the driver or by the act of the plaintiff and his wife in rashly and improperly springing from it. The court held that "if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff was entitled to recover; although the jury may believe, from the position in which the stage was placed from the negligence of the driver, the attempt of the plaintiff and his wife to escape may have increased the

peril or even caused the stage to upset, and although they also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

And in the case of Jones v. Boyce, 1 Stark. 482, which was an action against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken, Lord Ellenborough held: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at a certain peril. On the other *330 hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury he sustained is to be attributed to rashness and imprudence, he is not entitled to recover."

The doctrine is concisely stated in 1 Shearman and Redfield on Negligence, *89: "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury is of no importance."

The contention of the defendant was that the plaintiff was in a safe place, and that while it was true that the sight of a car coming as this one did was unusual, still that there was nothing attendant upon it which should lead one, in a safe position, precipitately to leave it. The counsel for the defendant at the trial requested the judge to charge that if the jury believe that Mrs. Tuttle was at a safe location before the injury complained of, and was afterward injured by removing from such safe place, she cannot recover, but this matter was correctly disposed of in the charge that "safe place is a term which is not easy to define. To charge that in this case she was 'in a safe place,' would be to charge that the circumstances which brought about this fright and terror under which she seems to have acted were not sufficient to warrant her in removing from that spot and seeking another which, in her judgment, and perhaps a mistaken judgment, she might have deemed safer. There is hardly enough evidence in this case to know whether it was exactly safe where

she stood. It turned out afterward to have been a safe place; but who could tell beforehand how many splinters from this car would fly in all directions, how many cobblestones or other things would fly around? You do not know when you see a car coming just what the end will be, and would naturally seek, possibly, a safer place than you think you occupy, although after it is all over, you may find that where you stood was a safe place."

[331] This is not a case involving the question whether an action can be sustained for mental anguish or injury unaccompanied by injury to the person; that this would not afford a ground of action is well settled.

In Canning v. Williamstown, 1 Cush. 451, it was held that there could be no recovery for risk and peril which caused fright and mental suffering, but those elements could be considered when there was bodily injury, however slight. And in Victorian Railway Commrs. v. Coultas, L. R. 13 App. Cas. 222, where, by a negligent act of the defendant, a collision with a railway train at a local crossing became imminent but actual collision was avoided. Nervous shock or mental injury, caused by fright at the occurrence, was held to be too remote a consequence of the defendant's act to be a ground of damage.

Mr. Justice Gummere, in Ward v. West Jersey etc. R. R. Co., 65 N. J. L. 383, 47 Atl. 561, clearly states the rule when he says: "It seems to be universally conceded that mere fright, from which no physical suffering results, affords no ground for action," and he subsequently holds that "where personal injury as well as fright is produced by the wrongful act, the rule is entirely settled that the jury is entitled, in fixing the damages, to consider the mental agitation as well as the physical injury." This harmonizes with the decision in Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100, and Buchanan v. West Jersey R. R. Co., 52 N. J. L. 265, 19 Atl. 254.

It is not perceived that the question of recovery for peril, causing mere fright unaccompanied by physical suffering, is, in the remotest sense, presented in this case. The injury sustained by the plaintiff and for which recovery is sought was not the result of fright, but was due to the falling down of the plaintiff and the injury to her knee. She was placed in peril by the negligent act of the defendant, and in her effort to escape from danger she fell and was injured. Does it require any stretch of imagination to believe that everyone

in the neighborhood of this derailed car was frightened, and it would be extraordinary, indeed, if they attempted to escape and were injured that they should be without remedy?

[339] I think the point decided in Buchanan v. West Jersey R. R. Co., 52 N. J. L. 265, 19 Atl. 254, governs this case. There a woman was lawfully on the railroad platform of the defendant. A piece of timber projected from one of the cars of a train so as to reach the platform, and in order to avoid being struck she was obliged to throw herself upon the platform. By reason of the shock to her nervous system her health was seriously impaired.

A verdict in her favor was sustained by the supreme court, Chief Justice Beasley saying: "The suit was not on the single ground that the plaintiff had been frightened. There was a basis for the action in the carelessness of the company which compelled the plaintiff to throw herself upon the platform, as such carelessness leading to that result was, per se, actionable. The fright was an incident to such cause of action and a mere aggravation of the tort": See also, Vandenburgh v. Truax, 4 Denio, 464, 14 Am. Dec. 268.

In the case under consideration the negligence of the defendant, in permitting the derailing and escape of the car, is too plain for argument, and it was such negligence as caused the plaintiff, in terror, to attempt to escape the peril by running, and in so doing she fell and was injured.

The true rule governing cases of this character may be stated as follows: That if a defendant, by negligence, puts the plaintiff under a reasonable apprehension of personal physical injury, and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.

The case below was properly submitted to the jury, and the judgment below should be affirmed.

Negligence.—A person placed in sudden danger by the negligence of another, and who, under the influence of great terror, does an act which may contribute to his injury, cannot be charged with contributory negligence so as to bar a recovery by him: Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094. See, also, Blackwell v. Lynchburg etc. R. R. Co., 111 N. C. 151, 32 Am. St. Rep. 786, 16 S. E. 12; Valin v. Milwaukee etc. R. R. Co., 82 Wis. 1, 33 Am. St. Rep. 17, and cases cited in cross-reference note thereto, 51 N. W. 1084.

McARDLE v. MAYOR AND ALDERMEN OF JERSEY CITY.

[66 N. J. L. 590, 49 Atl. 1013.]

CONSTITUTIONAL LAW.—CLASSIFICATION ON THE BASIS OF POPULATION in statutes relating to the machinery and powers of municipal government is legitimate where population bears a reasonable relation to the necessities and proprieties of such government. (p. 497.)

CONSTITUTIONAL LAW.—CONSTITUTIONAL RIGHT TO VOTE AT ALL ELECTIONS is denied by a statute providing for a board of excise commissioners, consisting of four members, to be elected, two members at each annual election for the term of two years, but that no ballot shall contain the name of more than one candidate. (p. 498.)

CONSTITUTIONAL LAW—STATUTES VALID IN PART.—If parts of a statute which are constitutional and parts which are unconstitutional are wholly independent of one another, the unconstitutional parts may be rejected and the constitutional parts enforced, but if all of the different parts of the statute are so intimately connected with and dependent upon one another as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all of the provisions thus dependent upon each other must fail. (p. 500.)

J. W. Queen and A. L. McDermott, for the plaintiffs in error.

W. L. McDermott and Vredenburgh, Wall & Van Winkle, for the defendants in error.

594 DEPUE, C. J. The board of aldermen of Jersey City, a city of the first class, passed a resolution May 7, 1901, to the effect "that the licenses for keeping of inns and taverns and the sale of liquors, to be issued by this board on the first day of July, 1901, shall be issued for the period of one year from that date, and shall be 595 issued only upon the payment of the full amount of one year's license fee for each license issued." McArdle, a resident and taxpayer of Jersey City, sued out a certiorari to set aside this resolution as violating the act providing for an excise department in cities of the first class. Dickinson was subsequently admitted as a party prosecutor. The supreme court on this certiorari adjudged that the resolution of the board of aldermen should be set aside, on the ground that it was in conflict with the act under consideration. This writ of error is brought to review the judgment of the supreme court, assigning as error that the said act is unconstitutional:

1. Because it is a private, local and special law; 2. Because it violates the provisions of article 2, section 1, of the constitution.

The act is entitled "An act to establish an excise department in cities of the first class in this state." It applies only to cities of the first class. The contention that it is based upon an insufficient classification is untenable. A classification on the basis of population in statutes relating to the machinery and powers of municipal government is legitimate where population bears, as it does in this instance, a reasonable relation to the necessities and proprieties of the municipal government: Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 448. This doctrine has been applied to sustain statutes relating to the police powers of municipalities, using that expression in its broadest sense: Warner v. Hoagland, 51 N. J. L. 62, 16 Atl. 166; Mortland v. Christian, 52 N. J. L. 521, 10 Atl. 673; In re Haynes, 54 N. J. L. 6, 22 Atl. 923; In re Sewer Assessment for Passaic, 54 N. J. L. 156, 23 Atl. 517; Owens v. Fury, 55 N. J. L. 1, 25 Atl. 934; Matheson v. Caminade, 55 N. J. L. 4, 25 Atl. 933; Baker v. Delaney, 55 N. J. L. 9, 25 Atl. 936; McLean v. Gibson, 55 N. J. L. 11, 25 Atl. 935; Wood v. Atlantic City, 56 N. J. L. 232, 28 Atl. 427; McLaughlin v. Newark, 57 N. J. L. 298, 30 Atl. 543, 58 N. J. L. 202, 34 Atl. 13.

This legislation does not infringe upon article 4, section 7, paragraph 11, of the constitution, which interdicts special laws regulating the internal affairs of towns and counties.

A question of more importance arises under the assignment of error that this act violates article 2, section 1, of the constitution, and for that reason is void. Article 2, section 1, regulates and secures the right of suffrage. It declares that [596] "every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people."

The construction of this constitutional provision, so vital to the existence of popular government, is not at all in doubt. The constitutional mandate is clear and distinct that every qualified voter "shall be entitled to vote for all officers that now are or hereafter may be elective by the people." So far as the construction of this constitutional mandate has been presented to the courts of this state, there is entire unanimity

in its construction. The decisions on that subject arose under these circumstances: The constitution provides that the members of assembly apportioned to any county shall be selected by the legal voters of the county. In State v. Wrightson, 56 N. J. L. 126, 199, 28 Atl. 56, it was held that an act of the legislature providing for the election in assembly districts of members of assembly apportioned to any county was unconstitutional and void. This decision was made on the ground that to every qualified voter was secured, by the fundamental law, the right to a voice in the election of all officers which, by the constitution or otherwise, are elective by the class of legal voters to which he belongs. In Allison v. Blake, 57 N. J. L. 6, 29 Atl. 417, it was decided by the supreme court that all persons within the class designated by the constitution are entitled to vote for all officers elective by the people, whether the offices to be filled be created by the constitution or by legislation; and that the class of voters who shall be entitled to the elective franchise cannot be diminished or enlarged by the legislature; and that, consequently, a statute which confined the right to vote for road commissioners to the freeholders of the districts, excluding qualified voters who were not freeholders, was unconstitutional. The same principle was adjudged in Kimball v. Hendee, 57 N. J. L. 307, 30 Atl. 894, with respect to the election of school trustees. The constitution of Ohio contains a provision similar to ours, that qualified voters shall be "entitled to vote at [597] all elections." It was held by the courts of that state that the constitutional right to vote at all elections is denied by a statute which provided for the election of four members of the board of police commissioners, but denied to any elector the right to vote for more than two persons for such commissioners: State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833; 9 Am. & Eng. Corp. Cas. 39. Indeed, the language of the prescription on this subject in our constitution is so explicit as not to admit of any other construction. In Allison v. Blake, 57 N. J. L. 6, 9, 29 Atl. 417, Chief Justice Beasley declared that "the constitutional language is clear and unambiguous, and there is not a syllable of the instrument that throws it in doubt. In the presence of such a fact, there is no room for construction. Under such circumstances, the rule of reason, as well as of law, peremptorily requires that the plain language of the primary law must be taken to express the purposes of its framers."

The act now under examination provides for a board of excise commissioners to consist of four persons, each of whom shall be elected at large in such city; and by section 2 it is provided that "within the time provided by law, before the election held next after the passage of this act for the election of municipal officers in any city of the first class, two persons shall be nominated for excise commissioners, one for a term of two years and one for a term of one year, by each political party or petitioning body of citizens having the right by law to nominate candidates for municipal offices, to be voted for at such election; and at such election the two persons receiving the highest number of votes for excise commissioner for each of said respective terms shall be the duly elected excise commissioners for the terms so specified; such commissioners shall be elected in the same manner as other municipal officers in said city, subject, however, to this proviso: That no ballot shall contain the name of more than one commissioner for each of said terms." The section quoted relates only to the first election. Section 3 provides for future elections—that two members of the board shall be nominated in the manner specified in section 2, but that no ballot shall contain the name of more than one person for excise commissioner. [598] On its face, this act is plainly an infringement of that constitutional provision which secures to qualified voters the elective franchise.

That the members of this board, when chosen by the people, are officers, is entirely clear. The act provides that these commissioners shall be elected in the same manner "as other municipal officers," and shall hold "office" for two years and have an annual salary of one thousand dollars each, and that each commissioner, before he enters upon the duties of his office, shall take and subscribe an official oath. These officials, elected as municipal officers at a popular election, are also charged with responsible and important public duties. In State v. Deshler, 25 N. J. L. 177, 182, trustees of school districts, constables and other township officers were declared to be officers within the meaning of this constitutional provision. A similar ruling was made with respect to school trustees, in Kimball v. Hendee, 57 N. J. L. 307, 30 Atl. 894, and with respect to road commissioners, in Allison v. Blake, 57 N. J. L. 6, 29 Atl. 417. In 5 Century Dictionary, 4091, title "Office," an office is described as "the right and duty conferred on an individual to perform

any part of the functions of government, and receive such compensation, if any, as the law may affix to the service."

The argument of the counsel for the defendants in error that this is not an election, but an appointment by the legislature of persons to perform the duties of excise commissioners, who shall be selected in the manner pointed out by the act, if sound (which it is not), would enable the legislature to tamper with the elective franchise at its will, and the constitutional provision which was designed to secure to the qualified voters of the state the elective franchise would be made a nullity.

It is contended that if those parts of sections 2 and 3 which provide that no ballot shall contain the name of more than one commissioner gives the act an unconstitutional effect, these words may be stricken out, leaving a board of excise commissioners consisting of four persons elected by the voters under the general election law. The question is whether the court will be justified in making such a judicial excision of [509] an act of the legislature, which seems to be complete in all its parts and evinces a purpose inconsistent with that which would be accomplished by such a mutilation of the statute. "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one which they may never have been willing, by itself, to enact": Poindexter v. Greenhow, 114 U. S. 270, 304. "But if the different parts of the act are so intimately connected with, and dependent upon, each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail": Johnson v. State, 59 N. J. L. 535, 539, 37 Atl. 949, 39 Atl. 646. The title of the act is quite decisive on this subject. It is entitled "An act to establish an excise department in cities of the first class in this state." It expressly provides that the excise department should consist of four persons, elected in the manner "as herein provided." That it was the purpose of the legis-

lature, in passing this act, to abolish the former method of constituting this board is manifest. Until commissioners are elected pursuant to the provisions of the act, there can be no excise department in the city to execute any of the provisions of this statute. The election of a board in the manner provided by the act is essential to "establish an excise department." It is quite clear, from the entire act, that an excise board consisting of four members, elected by the electors at large, was not contemplated in this legislative scheme. The manner in which this board is to be established being [600] in violation of the constitution, the entire scheme of legislation embodied in the act must fail.

It is also contended, in the same connection, that the proper mode of relief is by all the qualified voters in the county presenting ballots at the election containing the names of the whole number of commissioners to be elected, and therefore that this court should not entertain this writ of error. It is apparent that such a procedure would give rise to the greatest confusion. How are the qualified voters to procure the printing of such ballots, and what assurance can be had that even a majority of the qualified voters would adopt this method of securing their right of suffrage, or that the election officers would receive the ballots? Embarrassment arising in this manner induced the supreme court, in State v. Wrightson, 56 N. J. L. 215, 29 Atl. 56, to entertain a proceeding, by way of mandamus, without a previous demand or refusal. It is there said that "to postpone the commencement of these proceedings [that is, by mandamus] until the time preceding the annual elections, at which the county clerk and the clerks of the cities and townships of the county are required to perform the duties devolved upon them under the election laws, would effectually prevent proceedings then instituted being practically of any avail."

The defendants in error prosecuted their writ of certiorari, and brought up to the supreme court a resolution of the board of aldermen that, in the absence of this act, was regular and valid. The supreme court, on the hearing of the writ of certiorari, set aside that resolution, on the ground that such municipal action was not permitted by the act in question. That judgment of the supreme court is before this court by the writ of error, and we cannot determine the propriety of the judicial action of the supreme court without considering the

force and effect of the act under consideration, and, consequently, its validity under constitutional prescriptions.

The judgment of the supreme court should be reversed, and this act declared unconstitutional in its entirety.

Class Legislation.—Classification on the basis of population in statutes relating to the machinery and powers of municipalities is legitimate, if the population bears a reasonable relation to the necessities of the municipalities: Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; Knopf v. People, 185 Ill. 20, 76 Am. St. Rep. 17, 27 N. E. 22. See, too, Boorum v. Connelly, 66 N. J. L. 197, ante, p. 469, and cases cited in cross-reference note thereto, 48 Atl. 955.

Though Part of a Statute is Unconstitutional, the remainder should be given effect if the two parts are distinct and separable: Chicago etc. R. R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278, 37 N. E. 247; Commonwealth v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801, 49 Atl. 351; State v. Santee, 111 Iowa, 1, 82 Am. St. Rep. 489, 82 N. W. 445; Sinking Fund Commrs. v. George, 104 Ky. 260, 84 Am. St. Rep. 454, 47 S. W. 779.

A Statute Authorizing the Election of four members of a police board in a city, but denying the right of any voter to vote for more than two candidates, is unconstitutional: State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833.

JESSUP v. BAMFORD BROTHERS SILK MANUFACTURING COMPANY.

[66 N. J. L. 641, 51 Atl. 147.]

WATERS—DIVERSION OF SURFACE WATER.—The diversion or altered transmission of surface water by the erection of a building is not an actionable injury, even though damage ensues. (p. 506.)

J. B. Humphreys, for the plaintiff in error.

Z. M. Ward, for the defendants in error.

642 GUMMERE, J. The plaintiff in error is the owner of a lot of land fronting on Rip Van Winkle avenue in the city of Paterson. The lot is located upon the side of a hill, sloping sharply down from its rear line to the avenue. Upon the lot the plaintiff in error has constructed several buildings, one of which is styled a dye-house. This latter building is erected upon the street line and extends about one hundred and fifty feet back toward the rear of the lot. Owing to the lay of the land the rear of the building is necessarily upon a higher plane

than the front, and, in order to have the floor level, it was necessary to build up the front of the lot to the same plane as that portion thereof upon which the rear of the building rested. This was done by erecting a retaining wall upon the street line and filling in the land behind the wall with material, upon which a solid cement floor was laid. The front of the dye-house rested upon the top of this retaining wall. In order that the wall should not permanently hold back upon the lot of the defendant the surface water which from time to time flowed down upon them, openings called "weep-holes" were left, at different places along the base of the wall, to allow its escape. At one of these weep-holes a six-inch drain pipe was inserted, the apparent purpose of which was to enable the surface water to flow more readily through the aperture.

On January 1, 1900, the plaintiff, Annie Jessup, while passing along upon the sidewalk on Rip Van Winkle avenue, in front of the premises of the defendant, slipped and fell, breaking her arm. Her fall was due to the presence of ice upon the sidewalk, which, however, was not apparent to her, it being concealed by a light fall of snow. This ice lay just in front of the drain pipe opening which has been mentioned, and had formed from the water which discharged through that pipe. The trial judge instructed the jury that "no person [643] had a right to gather together the water on his own property and throw it upon the sidewalk in a stream, and, if he does so, and thereby renders the street more dangerous, or less convenient than otherwise it would be for public travel, then he is responsible for injuries caused thereby." He then told them that if they were satisfied that what the defendant did do increased the danger, and made the street less convenient for public travel, and through that the plaintiff met with her accident, then the defendant is to be held responsible, and should make compensation to Mrs. Jessup and her husband for the loss which they had sustained by reason of the accident. To this instruction there was an exception by the plaintiff in error.

We think the rule of law laid down by the trial justice was inaccurate, so far as its application to surface water is concerned. In the case of Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216, the defendant built a stable upon his property, situate on a hillside, the effect of which was to divert the flow of the surface water from its natural course and throw it upon the land of the plaintiff, where it had not previously flowed. The plaintiff sued to recover the damage suffered from the dis-

charge of this water upon his property. It was held by the supreme court that, notwithstanding the plaintiff had suffered from the act of the defendant, it was damnum absque injuria, the court declaring that, as a general proposition, "neither the retention, diversion, repulsion, or altered transmission of surface water is an actionable injury, even though damage ensues," and adding, by way of demonstration of the soundness of the principle laid down "if the right to run in its natural channels was annexed to surface waters as a legal incident, the difficulties would be infinite indeed; unless the land should be left idle, it would be impossible to enforce the right in its rigor, for it is obvious every house that is built and every furrow that is made in a field is a disturbance of such right. If such a doctrine prevailed every acclivity would be and remain a watershed, and most low ground become reservoirs."

The same question again came before the supreme court [644] in the case of Durkes v. Town of Union, 38 N. J. L. 21, and the doctrine of Bowlsby v. Speer was affirmed in the later decision, Chief Justice Beasley saying that Lord Tenterden had forcibly expressed the legal idea when he declared that "surface water was the common enemy, which every proprietor may fight and get rid of as best he may."

Afterward, in the case of West Orange Tp. v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670, the question of how extensive the right to divert the flow of surface water was came before this court for its consideration, and the cases above cited were referred to, with approval, by Mr. Justice Van Syckel in delivering the opinion. In that case the municipality was about to put into effect a scheme to collect the surface water over a large district, carry it away by means of artificial ducts or sewers, from where it would otherwise be discharged and pour it, in mass, upon the lands of an individual owner. It was held by this court that, although the principle established by the earlier decisions would warrant the diversion of the flow of surface water by the public authorities, so far as that diversion was merely incidental to, and occasioned by, the making or alteration of street grades, it was not so broad as to justify the municipality in carrying into effect its proposed scheme, the court saying that if the doctrine was as broad as was claimed by the municipality, there would be nothing to prevent it from constructing sewers by which the concentrated surface water of the entire town would be cast upon the premises of any proprietor that might arbitrarily be selected to bear the burden.

The distinction pointed out in the West Orange case is obvious; the inapplicability of the principle underlying its decision to the case under consideration is equally apparent.

Perhaps the leading case upon the subject of the diversion of surface water is that of Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625, where the rule is thus stated: "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an [645] alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it from the surface of adjacent lots, either to stand in unusual quantities on other adjacent lots or to pass into or over the same in greater quantities or in other directions than they were accustomed to flow; that the right of a party to the free and unfettered control of his own land cannot be interfered with or restrained by any consideration of injury to others which may be occasioned by the flow of mere surface water, in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

The same rule prevails (although not always laid down so broadly as in Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625) in New York, Maine, Connecticut, Indiana, Kansas, Minnesota, Wisconsin, and Missouri: Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Morrison v. Railroad Co., 67 Me. 355; Grant v. Allen, 41 Conn. 156; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Rowe v. St. Paul etc. Ry. Co., 41 Minn. 384, 16 Am. St. Rep. 706, 43 N. W. 76; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am.

Rep. 473; Abbott v. Kansas etc. R. R. Co., 83 Mo. 271, 53 Am. Rep. 581.

We think the doctrine laid down in Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216, and Town of Union v. Durkes, as elaborated in Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625, is the correct one. Its application to the facts of the present case requires a reversal of the judgment under review. The surface water flowing down the hill and over the land of the defendant would, if that land had been left in an unimproved state have naturally flowed upon and over the sidewalk of Rip Van Winkle avenue. The erection of the [646] dye-house and retaining wall by the defendant did not have the effect of increasing, in any degree, the flow of the surface water, or of causing it to be discharged in any greater quantity upon the sidewalk. It merely concentrated the flow in certain places upon it. This concentration was a necessary incident of the legitimate beneficial user of its property by the defendant, and any injury arising therefrom is not actionable.

The judgment below is reversed.

Mr. Chancellor Magie Dissented and maintained that the charge given by the trial court was a correct statement of the law. He said: "The rule respecting surface water and its discharge, as between the owners of adjoining lands, which is in force in New Jersey, I understand to be this, viz., that an owner of lands may retain upon his lands the surface water which comes thereon; he may repel or divert the surface water which would otherwise come upon his land from the land of an adjoining owner, or he may alter the course of transmission of such surface water, without liability to the owner of the adjoining land, provided that in so doing he does not collect such surface water and discharge it in a collected flow in unusual quantities or upon an unusual place on the adjoining land. If he does so, and the collected discharge produces injury, he is liable to the adjoining owner for such injury: Washburn on Easements, 4601; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Kelly v. Dunning, 39 N. J. Eq. 482. A similar rule, in my judgment, applies as between the owner of lands adjoining a highway and the public having the use of such highway. Their duties in respect to the surface water falling on the adjoining lands and the surface water falling on the highway are substantially alike, and as between such owner and the public there is a reciprocal liability for injury done by the violation of the rule: Phillips v. Waterhouse, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539. So our courts have uniformly held that while a municipality may change the grade of a highway, and will not be liable for an injury to the owner of adjoining land by water cast thereon as the mere incident

of the grade, yet that the municipality cannot collect waters not naturally thus discharged, and concentrate and discharge them upon such adjoining property without liability for such injury: Durkes v. Town of Union, 38 N. J. L. 21; Field v. West Orange, 36 N. J. Eq. 118, 37 N. J. Eq. 434; Field v. West Orange, 46 N. J. Eq. 183, 2 Atl. 236; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61; 48 N. J. Eq. 645, 25 Atl. 20; Soule v. Passaic, 47 N. J. Eq. 28, 20 Atl. 346. I think the same principle applies where the water discharged, though not of sufficient volume to disturb the surface of the street, yet, in freezing weather, deposits ice thereon, which presents an obstacle and danger to the free and safe passage of persons using the highway, and that a like liability will be incurred by the adjoining owner to the public or any person who, without negligence, was injured thereby."

Mr. Chief Justice Depue, Mr. Justice Garretson, and Judges Bogert and Adams concurred in the views expressed by Mr. Chancellor Magie.

Surface Water.—A land owner may by improvement of his property turn surface water onto another's land, and any changes which thereby take place in the natural drainage of the water are immaterial: See the monographic note to Mizell v. McGowan, 85 Am. St. Rep. 727.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

MATTER OF DOWS.

[167 N. Y. 227, 60 N. E. 439.]

CONSTITUTIONAL LAW.—AN INHERITANCE TAX IS NOT ON PROPERTY, but on the succession, and therefore a state is not, in the exercise of the power to impose an inheritance tax, limited by the provisions of the constitution requiring uniformity and equality in taxation. (p. 510.)

INHERITANCE TAX, WHEN MAY BE COLLECTED OUT OF PROPERTY PASSING BY THE EXERCISE OF A POWER OF APPOINTMENT.—If a testator devises property in trust for a life then in being, and provides that at the termination of that life it shall vest in the surviving children of that person and such of the issue of his deceased children as he may designate and appoint by his will, the property so passing by such appointment is subject to an inheritance tax, though at the time of the making of the will there was no transfer tax as against the descendants of the testator. (p. 512.)

AN INHERITANCE TAX IS IMPOSED ON ESTATES IN REMAINDER by the statute of New York, and the right to collect such tax is not suspended until the determination of the precedent estates. By the aid of a table of annuities the present value of the remainders is capable of ready computation. (p. 513.)

Appeal from a judgment of the appellate division affirming an order of the surrogate of the county of New York imposing a transfer tax

Horace E. Deming and Julius Henry Cohen, for the appellants.

Jabish Holmes, Jr., and Joseph W. Middlebrook, for the respondents.

229 CULLEN, J. David Dows, Sr., died March 30, 1880, leaving as a part of his estate a valuable piece of real property, which he devised to his trustees in trust to pay the income to his son, David Dows, Jr., during life, "and upon the death of my said son the said property, with all accumulations of interest, income, and profits, shall vest absolutely and at once in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner and upon such terms as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit." A similar devise was made of a share of the testator's residuary estate. The will gave the trustees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations. David Dows, Jr., died January 13, 1899, leaving a last will and testament, by which he exercised the power of appointment given him by the will of his father, in favor of his three sons. By his will he gave to each of his sons the income of three undivided forty-eighths till his son Robert attained the age of twenty-one years or sooner died, of four forty-eighths until Robert attained twenty-five years or sooner died, and nine forty-eighths until Robert attained thirty years or sooner died. Thus each son was given the income of 230 sixteen forty-eighths or one-third of the property. At the termination of these life estates the principal was given to another son—that is to say, to B was given the principal of the share the income of which A had been receiving; to C the principal of what had been B's share, and to A the principal of C's share. In result each son receives one-third of the property absolutely, for the will provides "that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency." But each son instead of being given the remainder in his own share after Robert arrives at the age of thirty years is given the remainder in another son's share, though the shares are exactly equal. The learned surrogate imposed a tax

on the property passing under this power of appointment both on the life estates and on the remainders. His order was affirmed by the appellate division and an appeal has been taken to this court.

The first objection raised to the order of the surrogate's court is that the tax imposed under the amendment of April 16, 1897 (chapter 284), to the taxable transfer act of 1896, upon transfers made under a power of appointment, is a tax on property and not on the right of succession, and that, therefore, so much of the fund as was invested in incorporated companies liable to taxation on their own capital and in certain bonds of the state of New York and bonds of the city of New York exempt from taxation by statute, was not subject to the tax. On this question we are concluded by the previous decisions of this court (Matter of Vanderbilt, 163 N. Y. 597, 57 N. E. 1127, affirmed on opinion of Justice Patterson below in 50 App. Div. 246, 63 N. Y. Supp. 1049; same case decided without opinion, 166 N. Y. 640, 60 N. E. 1121), and little need be now said thereon. The theory on which taxation on the devolution of estates at the death of their owners is based and its validity upheld even in cases where the state seeks to reach United States securities is clearly established, not only by our own decisions (Matter of Swift, 137 N. Y. 77, 32 N. E. 1096; Matter of Sherman, 153 N. Y. 1, 46 N. E. 1032), but by those of the supreme court of the United States: Magoun [231] v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 774; Murdock v. Ward, 178 U. S. 139, 20 Sup. Ct. Rep. 775. In Magoun v. Illinois Trust etc. Bank, it is said of such taxes: "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession; 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation." The same doctrine was again asserted in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747. It is insisted, however, that the title of the present owners is deduced from the will

of David Dows, Sr., and not from that of his son David Dows, Jr., and in support of this claim are cited the cases of Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91, and Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850. The proposition is doubtless true to a certain extent. For the purpose of determining whether the execution of a power is in contravention of the statute of perpetuities, the estate created under such power must be referred back to the instrument granting the power. This is settled law and was so held in Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91. Any other rule would permit the evasion of the statute against perpetuities by the grant of powers. The decision in Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850, proceeded on the ground that at the time of the exercise of the power of appointment in that case the legislature had not provided for the taxation of transfers under such powers. But whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the supreme court of the United States, the right to take property by devise is not an inherent or [232] natural right, but a privilege accorded by the state which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the state. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself—that is, for the privilege of succeeding to property under a will. Had the fund passed in default of an exercise of the power of appointment a very different proposition would be presented. We express no opinion on the question whether, under such circumstances, the tax imposed by the amendment of 1897 could be deemed other than a tax on the property itself.

The second objection urged against the order appealed from is, that at the death of David Dows, Sr., the property was real estate on which there was at that time no transfer tax as against lineal descendants of the testator. In Matter of Sut-

ton, 3 App. Div. 208, 38 N. Y. Supp. 277, affirmed by this court on opinion below, 149 N. Y. 618, 44 N. E. 1128, the will directed an equitable conversion of the realty into personalty. It was held that the actual form in which the property existed at the time of the testator's death determined its liability to a transfer tax, and that, being real estate, it was exempt. The same rule governs the present case. At the time of the execution of the power of appointment under the will of David Dows, Sr., the property was personal. As we have held that it is the execution of that power which subjects grantees under it to the transfer tax, it follows that the condition or form of the property at the time of such execution must control.

The third objection is, that the legatees or devisees of the remainders are not subject to taxation until the precedent estates terminate and the remainders vest in possession. Practically each son of David Dows, Jr., is bequeathed one-third of the fund absolutely, with the time of enjoyment in possession postponed. What motive dictated the curious 233 shifting of remainders found in the will of David Dows, Jr., we do not know, nor is it necessary that we speculate thereon. We shall treat these remainders as they are given in the will—that is, each at the termination of a life estate in another party. Still, under the statute, it is plain that they are presently taxable. Subdivision 4, section 220 of the tax act (amended by chapter 284, Laws of 1897) directs that the tax shall be imposed "when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act." Section 223 of the same law provides that all taxes shall be due and payable at the time of the transfer, except that "taxes upon the transfer of any estate, property, or interest therein limited, conditioned, dependent, or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Under a statute substantially the same in phraseology, this court held, by Finch, J., in Matter of Hoffman, 143 N. Y. 327, 38 N. E. 311, that mere possibilities or chances of the acquisition of property, including not only contingent

estates, but also estates technically vested, but liable to be devested, were not liable to taxation until the contingencies had passed or been fulfilled, and the right to succeed to property become certain and absolute. This doctrine has no application to the remainders given to the sons of David Dows, Jr. They are absolute and not subject to be devested or to fail in any contingency whatever. By statute they are alienable, devisable, descendible, and if the property were real estate, it could be sold on execution against their owners: Sheridan v. House, 4 Keyes, 569; Moore v. Littel, 41 N. Y. 66. By the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation. Therefore, [234] they do not fall within the exception of the statute, and are subject to present taxation. Matter of Roosevelt, 143 N. Y. 120, 38 N. E. 281, is not in conflict with this view. In that case it was held that certain vested remainders should not be taxed until the termination of the preceding life estate. The will then before the court bequeathed, after the death of the life tenant, seven life annuities contingent upon the survival of the life tenant by the annuitants, with cross-remainders among the annuitants themselves. These annuities, being contingent, were not, under the rule declared by Judge Finch in the Hoffman case, taxable or their value ascertainable until they came into actual existence. The remainders given by the will were subject to these annuities. As the value of the annuities was not capable of ascertainment, the value of the remainders subject to those annuities was necessarily equally incapable of computation. It was on this ground the decision proceeded. There is no such difficulty in the present case, and the decision of the Roosevelt case is, therefore, not in point.

The order appealed from should be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Martin, Vann and Landon, JJ., concur.

A Writ of Error in the Principal Case was prosecuted to the supreme court of the United States where the case was entitled Orr v. Gilman, and the opinion of that court affirming the judgment may be found in 183 U. S. 278, 22 Sup. Ct. Rep. 213. Such opinion is as follows:

"This is the case of a so-called transfer tax imposed under laws of the state of New York. The various contentions of the plaintiffs in error, attacking the validity of the tax, were overruled by the courts of the state, and the cause is now before us on the

general proposition that by the proceedings the plaintiffs in error, or those whom they represent as trustees and guardians, have been deprived of the equal protection of the laws of the state of New York, their privileges and immunities as citizens of the United States have been abridged, and their property taken without due process of law, in violation of the fourteenth amendment to the constitution of the United States, and likewise, as to a portion of the property affected, in violation of section 10 of article 1 of the constitution of the United States.

"The first question presented arises out of subdivision 5 of section 220 of the tax law of the state of New York, which reads as follows: '5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable, under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure': Laws 1897, c. 284.

"This enactment became a law on April 16, 1897. David Dows, Sr., died March 30, 1890, leaving a will containing a power of appointment to his son, David Dows, Jr., which will was duly admitted to probate by the surrogate's court on April 14, 1890. David Dows, Jr., died on January 13, 1899, leaving a will in which he exercised the power of appointment given him in the will of his father, and apportioned the property which was the subject of the power among his three sons, who are represented in this litigation by the plaintiff in error.

"It is claimed that under the law of the state of New York as it stood at the time of his death, in 1890, David Dows, Sr., had a legal right to transfer, by will, his property, or any interest therein, to his grandchildren, without any diminution or impairment then imposed by the law of the state upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred; and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the state, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from

the grandchildren a portion of the very property the full right to which had vested in them many years before.

"We here meet, in the first place, the question of the construction of the will of David Dows, Sr. Under and by virtue of that will did the property whose transfer is taxed pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of the will of David Dows, Jr., exercising the power of appointment? The answer to be given to this question must, of course, be that furnished us by the court of appeals in this case (Re Dows, 167 N. Y. 227, ante, p. 508, 60 N. E. 439): 'Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the supreme court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state, which it may tax or charge for, it follows that the rights of a testator to make a will or testamentary instrument is equally a privilege, and equally subject to the taxing power of the state. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will.'

"It will be perceived that in putting this construction upon the will of David Dows, Sr., the court of appeals not merely construed the words of the will, but, by implication, applied to the case the provisions of the subdivision 5 of section 220 under which the transfer tax in question was imposed, and thus construed that tax law, and affirmed its validity.

"While it is settled law that this court will follow the construction put by the state courts upon wills devising property situated within the state, and while it is also true that we adopt the construction of its own statutes by the state courts, a question may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the constitution of the United States. And such is the contention here.

"This court has no authority to revise the statutes of New York upon any grounds of justice, policy, or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the state.

"In Carpenter v. Pennsylvania, 17 How. 456, the question arose as to the validity, in its federal aspect, of a law of the state of Pennsylvania imposing an inheritance tax on personal property which had passed into the possession of an executor before the

passage of the act, and which was held by him for the purpose of distribution among the legatees, who were collateral relatives to the decedent. The act was held valid by the supreme court of the state, and was brought up to this court by a writ of error, where it was contended that such an act was in its nature an ex post facto law, which took the property of an individual to the use of the state, because of a fact which had occurred prior to the passage of the law; and also that the law, in its retroactive effect, impaired the obligation of a contract, in that it was alleged to absolve the executor from his contract, implied in law, to pay over the legacies to those entitled to them, just to the extent that the law required him to pay to the state. The opinion of the court, delivered by Mr. Justice Campbell, was in part as follows:

" 'The validity of the act as affecting successions to open after its enactment is not contested; nor is the authority of the state to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is that the application of the act of 1826 by that of 1850 to a succession already in the course of settlement, and which had been appropriated by the last will of decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the state; that the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were nonresidents, and the property taxed was also beyond the state; and that the state has employed its power over the executor and the property within its borders to accomplish a measure of wrong and injustice; that the act contains the imposition of a forfeiture or penalty, and is ex post facto.

" 'It is in some sense true that the rights of donees under a will are vested at the death of the testator, and that the acts of administration which follow are conservatory means directed by the state to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But, until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control prescribed by the state in the interests of public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the state, during this period of administration and control by its tribunals and their ap-

pointees, think fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it: Ennis v. Smith, 14 How. 400.

" 'The act of 1850, in enlarging the operation of the act of 1826 and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the state, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And, as the supreme court [of Pennsylvania] has well said, "in establishing its peculiar interpretation, it [the legislature] has only done indirectly what it was competent to do directly." But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an ex post facto law within the tenth section of the first article of the constitution. The debates in the federal convention upon the constitution show that the terms "ex post facto laws" were understood in a restricted sense relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning: 3 Madison Papers, 1399, 1450, 1579. This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time: Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cranch, 87; Watson v. Mercer, 8 Pet. 88; Charles River Bridge v. Warren Bridge, 11 Pet. 421.'

"It is true that this case was decided before the adoption of the fourteenth amendment, but we think it correctly defines the limits of jurisdiction between the state and federal governments, in respect to the control of the estates of decedents, both as they were regarded before, and have been regarded since, the adoption of the fourteenth amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the states in regard to the devolution of estates, or to the extent of the taxing power over them.

"In Re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930, it was stated by the present chief justice that 'the fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states; and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citi-

zens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States: United States v. Cruikshank, 92 U. S. 542; Slaughter-house Cases, 16 Wall. 36.'

"It was said in De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. Rep. 461, that 'it is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances.'

"In Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. Rep. 873, the proposition was again announced as one requiring only to be stated, that the law of a state in which land is situated controls and governs its transmission by will, or its passage in case of intestacy; and that in this court the local law of a state is the law of that state, as announced by its court of last resort.

"In Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 17 Sup. Ct. Rep. 594, the validity of a law of the state of Illinois imposing a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired, was assailed in the courts of Illinois as being in violation of the constitution of that state requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the constitution of that state, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws, within the meaning of the fourteenth amendment to the constitution. But these contentions were held by this court to be untenable.

"See, likewise, Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747, and Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 774, wherein were considered the nature of inheritance tax laws and the extent of the powers of the states and of Congress in imposing and regulating them.

"In the light of the principles thus established we are unable to see in this legislation of the state of New York, as construed by its highest court, any infringement of the salutary provisions of the fourteenth amendment. There are involved no arbitrary or unequal regulations prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

"But it is further urged that the tax law of the state of New York, section 221, expressly exempts from taxation or charge all real estate passing to lineal descendants by descent or devise, and

all such descendants so taking title to real estate from ancestors; and it is said that under the interpretation of this law by the courts of the state of New York all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

"It is true that the property described in the sixth paragraph of the will of David Dows, Sr., was real estate, but under the powers conferred in the will of David Dows, Sr., the trustees had converted the real estate, and held the proceeds as personal property, before the death of David Dows, Jr., and it was this personal property which became vested in the grandchildren under the exercise of the power of appointment. The court of appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the federal constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the court of appeals respecting the question was wrong, it was an error which we have no power to review.

"Another objection made to the judgment of the court of appeals affirming the surrogate's order is that the tax imposed upon transfers made under a power of appointment is a tax upon property, and not on the right of succession; and that, as a portion of the fund was invested in incorporated companies liable to taxation on their own capital, and in certain bonds of the state of New York, and in bonds of the city of New York exempt by statute from taxation, such exemption formed part of the contract under which said securities were purchased, and the tax imposed and the proceedings to enforce it were in violation of section 10 of article 1 of the constitution of the United States forbidding the states to pass laws impairing the obligation of contracts.

"The court of appeals overruled the proposition that the transfer tax in question was a tax upon property, and not upon the right of succession, and held that when David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will, and that the charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will.

"In reaching this conclusion the court of appeals cited not only various New York cases, but several decisions of this court, the

principles of which were thought to be applicable: Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 774; Knowlton v. Moore, 178 U. S. 41; 20 Sup. Ct. Rep. 747; Murdock v. Ward, 178 U. S. 139, 20 Sup. Ct. Rep. 775.

"We think it unnecessary to enter upon another discussion of a subject so recently considered in the cases just cited and that it is sufficient to say that, in our opinion, the court of appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the constitution of the United States.

"A further contention is made that the legatees or devisees of the remainders created by the will of David Dows, Jr., are not legally subject to taxation until the precedent estates terminate and the remainders vest in possession.

"The court of appeals held that the doctrine invoked had no application to the remainders given to the sons of David Dows, Jr.; that they are absolute, and not subject to be devested, or to fail in any contingency whatever; that by statute they are alienable, devisable, descendible, and if the property were real estate, they could be sold on execution against their owners; that by the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation; and that therefore they are subject to present taxation.

"These views of the court of appeals must be accepted by us as accurate statements of the law of the state; and though it is claimed in the brief of counsel for the plaintiffs in error that such a construction of the transfer tax law brings it into conflict with the fourteenth amendment of the constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state law expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the federal constitution: Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594.

"Other contentions made in the brief of counsel for the plaintiffs in error seem, so far as our jurisdiction is concerned, to be phases of those heretofore considered, and thereby disposed of.

"The judgment of the court of appeals of the state of New York affirming the judgment of the surrogate's court of New York county is affirmed."

Mr. Justice Harlan concurred in the result.

Collateral Inheritance Tax Laws are considered in the monographic note to State v. Hamlin, 41 Am. St. Rep. 580-585. As to

whether such laws must be uniform and equal in their operation, see Estate of Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245; Estate of Cope, 191 Pa. St. 1, 71 Am. St. Rep. 749, 43 Atl. 79; Drew v. Tifft, 79 Minn. 175, 79 Am. St. Rep. 446, 81 N. W. 839.

DEMING v. TERMINAL RAILWAY OF BUFFALO.

[169 N. Y. 1, 61 N. E. 983.]

A CITY IS UNDER AN ABSOLUTE DUTY TO KEEP ITS STREETS IN SAFE CONDITION FOR PUBLIC TRAVEL, and this obligation cannot be evaded by letting the work of excavating in a public street to an independent contractor. (p. 526.)

MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTOR.—A city which has let the work of excavating in a public street to an independent contractor is not liable for injuries occasioned by the negligence of the contractor's employés. (p. 527.)

INDEPENDENT CONTRACTOR—INJURY IN HIGHWAY. A RAILROAD COMPANY WHICH, BY STATUTE, HAS ABSOLUTE DOMINION OVER A HIGHWAY for the purpose of carrying it across a railroad track is liable for injuries to passersby upon the highway, due to a failure to properly guard the excavations therein, although the construction of the road has been let to an independent contractor. (pp. 522, 529.)

William B. Hornblower and John Laughlin, for the appellants.

Clarence M. Bushnell, for the respondent.

PARKER, C. J. The Terminal Railway of Buffalo, a corporation duly organized under the laws of this state for the purpose of constructing a railroad to form a connecting link between the Lake Shore and Michigan Southern and the New York Central and Hudson River railroads, was in 1897 engaged in constructing its road from Depew to Blaisdell, to which end it entered into a contract with the firm of Smith & Lally, by the terms of which that firm was to perform the entire work of construction in accordance with certain plans and specifications which were made a part of the contract. By the order of the supreme court made in pursuance of statute defendant was permitted to construct its road across the White Corners road, a public highway extending from the city of Buffalo to the village of Hamburg, a condition imposed by the order being that it should comply with the statute and

restore the highway to such state as not to impair its usefulness. The plans and specifications required that such highway should be lifted eight feet and five inches above its original grade, and that the railroad track should be depressed about twelve feet below the original grade, the highway then to be carried across the track by means of an overhead bridge.

[5] About the 7th of September work was begun at this point, and the contractors in the course of their operations removed the earth from the west to the east side of the highway resulting in the formation of an embankment covering a little over one-half of the highway for a distance of about six hundred feet north of the proposed crossing, and it extended up to within fifty or one hundred feet of the temporary track. It was about twelve feet wide on top, the sides sloping gradually, and its maximum height was seven feet. When completed it was designed to serve as the roadbed of the northerly approach to the bridge over the tracks. The highway at this point was four rods wide, and the presence of the embankment left a space of about thirty feet in width upon the west side thereof for the passage of teams, but only about twelve or fifteen feet of this space was used by the traveling public.

During the evening of September 16, 1897, the plaintiff and her husband, in company with some ten or twelve other people, while going from Hamburg to Buffalo in a four-seated drag drawn by four horses, in charge of a competent driver, who was ignorant of the existence of the embankment, struck it with the drag, which immediately tipped over, throwing the plaintiff to the ground, from which she received severe injuries. There were no lights upon or in the vicinity of the embankment to warn passersby of the interference with, and dangerous condition of, the highway, and the night was dark and rainy.

The plaintiff had a recovery which the appellate division affirmed and afterward allowed an appeal to this court. Through requests to charge, which were refused, and exceptions taken to the charge as made, appellant is enabled to present in this court the question whether it is liable because of the omission to properly guard the embankment on the night in question. Its claim is that having let the contract of constructing the entire road to competent and skillful independent contractors, it is not liable for any failure on their part to protect passersby upon the highway by placing lights upon the embankment and otherwise guarding it.

[6] The first authority cited by it in support of its position is the well-known case of Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, wherein it was held that "where persons having a license or a grant to construct at their own expense a sewer in a public street engage another person to construct it at a stipulated price for the whole work, they are not liable to other persons for any injuries resulting from the negligent manner in which the sewer may be left at night by the workmen employed in its construction." In that case the license or grant given by the city authorities contained a provision "that the grantees should cause proper guards and lights to be placed at the excavation and should be answerable for damages or injuries which might be occasioned to persons, animals, or property in the construction of the sewer." But the court, after a very able discussion of the doctrine of respondeat superior, reached the conclusion that only an immediate employer of the agent or servant who neglected to properly guard the sewer on the night when the injuries occurred was responsible for that negligent act. It must be conceded if that case was properly decided that the defendant is not liable for the failure of the contractors, their agents or servants, in this case to properly guard the embankment for the protection of the passers-by upon the highway during the night in question.

The discussion of the doctrine of respondeat superior in that case was an exhaustive one, and, indeed, it may be said to be a leading case upon that subject, for it has been cited with approval many times by the courts of this state, and in this court in the following, among other, cases: Pack v. Mayor etc. of New York, 8 N. Y. 222; Kelly v. Mayor etc. of New York, 11 N. Y. 432, 433; McCafferty v. Spuyten Duyvil etc. R. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Herrington v. Village of Lansingburgh, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728; Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Berg v. Parsons, 156 N. Y. 109, 112, 66 Am. St. Rep. 542, 50 N. E. 957; Uppington v. City of New York, 165 N. Y. 222, 232, 59 N. E. 91.

Reference will be made to all of these cases in detail later, but for the present I pass to the first case in this court which [7] challenged the correctness of the decision in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, upon the ground that the doctrine of respondeat superior was not applicable to the situation presented in that case—namely, Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437. Judge Comstock, in writing the

opinion in that case, conceded that the opinion in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, contained a correct exposition of the doctrine of respondeat superior, in which view this court has to this day steadily agreed, but he contended in effect that the doctrine was not applied with strict accuracy to the facts in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, because the injury did not result from negligence in the actual performance of the work—that is, in the manner in which the work was carried on by the laborers, but that the accident was the result of the work itself, however skillfully performed. He said: "A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond to third persons if his servants or laborers are negligent in the immediate execution of the work, but the ultimate superior or proprietor first determines that the excavation shall be made and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he makes as made for the very thing which creates the danger? What, then, is the obligation of a city corporation when it undertakes to construct a sewer in a public street? Can it in that undertaking and in any mode of providing for the execution of the work throw off the duty in question and the responsibilities through which that duty is to be enforced? Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend upon the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take these precautions." The reasoning in that case led to the decision, from which only one member of the court dissented, that the city of Utica, because it owed to the public the duty of keeping its streets in a safe condition for travel, was liable to plaintiff for the injuries received owing

to the neglect to keep proper lights and guards around an excavation which it had caused to be made by an independent contractor.

In Brusso v. City of Buffalo, 90 N. Y. 679, the plaintiff, while attempting to cross the street in the night-time, fell into an unguarded excavation and received injuries for which the jury awarded him damages. One of the defenses was that while the excavation was made under the direction of a department of the city government the performance of the work was let to an independent contractor, and the city denied liability for his failure to properly guard the excavation. This court said, Judge Earl writing: "The city was under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise a reasonable diligence and care to accomplish that end, and when it caused the excavation to be made in the street it was bound to see that it was carefully guarded, so as to be reasonably free from danger to travelers upon the street. It is not absolved from its duty and its responsibility because it employed a contractor to make the excavation. This is settled by a long line of decisions in this and several other states": Citing Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437, and authorities from other jurisdictions.

Vogel v. Mayor etc. of New York, 92 N. Y. 10, 40 Am. Rep. 349, presents a very different question from that discussed in the case already referred to, for there the injury was occasioned to plaintiff's lands by the accumulation of surface water owing to the excavations in the street, which were made under a contract with the city in 1858, partly performed and abandoned in 1859. It was not until 1873 that the city employed another person to complete the work, and the city's liability was predicated upon the ground that it permitted this excavation to remain during this long period when it had the power and right to take charge and complete the work, and thus protect the plaintiff's property from injury. In the course of the opinion, Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, was held not to be in point, and the court referred with approval to the fact that that case was criticised and questioned in the case of Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437, in that it correctly expounded but improperly applied the doctrine of respondeat superior.

In Turner v. City of Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344, the city had employed a contractor to

do certain work upon a sewer. He had completed his work at that part of the street where the plaintiff fell, owing to a loosened stone which had been undermined by recent rains, leaving it insecure. The city had not yet accepted the work of the contractor, although the street was open at that point for public travel, and on that ground it denied responsibility, and it was held, Judge Gray writing: "The duty of the city to keep its streets in safe condition for public travel is absolute, and it is bound to exercise a reasonable diligence and care to accomplish that end, and in cases like the present, where it has employed a contractor to do work involving excavation on its streets, it is not absolved from its duty and responsibility": Citing Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437; Brusso v. City of Buffalo, 90 N. Y. 679.

In Pettengill v. City of Yonkers, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095, the excavation in the street which occasioned the injury to the plaintiff, owing to the fact that it was not properly guarded at night, was made by a board of water commissioners. The court held the board was a department of the city government, and, therefore, that case did not present the question whether the city would have been liable had the work been done by an independent contractor. In the course of the opinion, however, it was stated that "a municipality is not absolved from liability because the injury results from the [10] negligence of a contractor with the city who by his contract is bound to properly guard an excavation or to place warning lights": Citing Turner v. City of Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344, and other cases.

These cases, as we have seen, recognize the principle that inasmuch as a municipality owes to the public generally the duty of keeping the streets in a safe condition for public travel, although it may temporarily interfere with the streets for the public good by constructing sewers therein, laying water mains, and making such other excavations from time to time as the public needs require it still owes the public the duty of protecting them from falling or driving into such excavations, which in some cases can only be performed by constructing barriers across the streets to prevent their use by the public temporarily and in others may be fully accomplished by properly lighting such excavations in the night-time, and otherwise guarding them so as to permit, without danger to the passerby, the free use of that portion of the street which

has not been interfered with. And this obligation it cannot escape by letting the work of excavation to an independent contractor, although it is legally absolved from injuries resulting from the negligent acts of the servants of the contractor in the prosecution of the work.

Attention will now be given to the leading cases in this court, citing Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, which are claimed by appellant's counsel to fully sustain that case and also to be in hostility to the decision in Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437.

Pack v. Mayor etc. of New York, 8 N. Y. 222 and Kelly v. Mayor etc. of New York, 11 N. Y. 432, may be considered together, as each presented the same question. In each the municipal corporation had contracted for the grading of a street with an independent contractor, and in each the plaintiff was injured as the result of carelessness of the contractor's employés in blasting. It was held in those cases, as it had been in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, and has since been in every case where the question has been up, that the city was not liable, as the injuries were occasioned by the [11] neglect of the contractor's employés over whom the city had no control whatever in the performance of the work undertaken by the contractor. Both of these cases were referred to in Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437, as correctly applying the "general principles so well set forth in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304."

The question presented in McCafferty v. Spuyten Duyvil etc. R. R. Co., 61 N. Y. 178, 19 Am. Rep. 267, did not relate to the public streets at all. The injury complained of was occasioned by the negligent acts of the employés of a contractor who was blasting out rocks so as to throw them upon the lands of another. The railroad company which owned the lands upon which the blasting was being conducted was prosecuted for the injury, and this court held, on the authority of the Pack, Kelly, and other cases, that the defendant having let out the work of construction to an independent contractor, it was not liable for the negligence of the men employed by him. Judge Earl, in the opinion referred to the Storrs case as expressly approving the Pack and Kelly cases, and as criticising Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, and stated the distinction between the Storrs case and the one under review in these words: "In that case the defendant was held liable

because it owed a duty to the public to keep the streets in a safe condition for travel, and not because it was responsible for any negligent acts of the contractor."

In Herrington v. Village of Lansingburgh, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728, the injuries sustained by the plaintiff were occasioned by the carelessness of the employés of an independent contractor in blasting for the purpose of the construction of a sewer. The question presented, therefore, was precisely the same as in the Pack and Kelly cases, and the municipality was held not liable upon the authority of those cases.

In Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262, the inquiry was not whether the city was liable, but whether an independent contractor was. The defendant Freel sought to evade liability upon the ground that he was not an independent contractor, but a mere servant of the city. But his contention was not sustained and the judgment against him was affirmed. As that was a case [12] where the injuries were sustained by falling into a hole in the public streets created under the direction of the defendant, it may well have been that the city was also liable. But that question was not before the court for decision, nor was it discussed.

In Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017, the injuries to the plaintiff were occasioned by the falling of the staging around a vessel upon which the plaintiff stood in order to calk the vessel, and Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, was cited merely as an authority upon the question involved in that case, whether the relation of employer and employé existed between the defendant and the plaintiff.

Nor did Berg v. Parsons, 156 N. Y. 109, 66 Am. St. Rep. 542, 50 N. E. 957, have to do with the public streets. In that case, an owner contracted with another to excavate his lot for building purposes, and the contractor so carelessly conducted the blasting that rocks were thrown upon and injured the property of another, and it was held, citing Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, and the Pack, Kelly and McCafferty cases, that the owner was not responsible for the negligent performance of the work by the contractor.

Nor did Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91, present the question whether a municipality is bound to see to it that excavations which it authorizes in the public streets are guarded at night for the protection of the traveler. The injury which the plaintiff sustained in that case was not

personal, coming to him while upon the public street, but instead was an injury to his lands occasioned by the settling of the ground in front of his premises due to the negligent manner in which the contractor had filled an excavation necessary to the construction of a sewer. As the city had authority by law to construct the sewer by contract, and had fully performed all the obligations resting upon it in that regard, it was held that it was not liable on its part for injury to adjoining lands resulting from the negligence of an independent and concededly competent contractor. In support of that general proposition it cited Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, Berg v. Parsons, 156 N. Y. 109, 66 Am. St. Rep. 542, 50 N. E. 957, and other authorities sustaining it. Many others might have been cited, for the authorities upon that general proposition are in agreement in this court.

[13] I have thus called attention to the principal authorities relied upon by the appellant in support of his contention that Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, is still the law for every question decided by it, and have pointed out the fact that not one of those cases presents one of the questions decided by the Blake case—namely, that a party having authority to make the public streets dangerous for passersby may be relieved from the burden of guarding the place of danger in the street by letting the work to an independent contractor. On the other hand, it has been observed that so much of the decision in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, as so decided was distinctly overruled in the Storrs case, the doctrine of which, in that respect, has since been followed in several cases where the question was up for decision. From the time of the decision in the Storrs case until now this court has consistently recognized the distinction between the two cases, rightly treating Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, as the leading case so far as it involves a consideration of the general principles of respondeat superior, and the Storrs case as establishing that such rule is not applicable to a case where the injury results from a failure on the part of the municipality to properly guard an excavation or obstruction authorized by it in a public street committed to its care.

Now, dominion over the highway was, by the operation of the statute, upon the order of the supreme court, for the purpose of carrying the highway over the railroad tracks vested in the defendant railroad company, which having accepted the

privileges and benefits conferred upon it by statute, necessarily took with them all the obligations and liabilities in respect to the highway which its absolute dominion over it for the purpose of carrying it across the railroad track made necessary, among which was the duty of so guarding the obstructions to the highway which were made under its direction as to save passersby from injury.

The judgment should be affirmed, with costs.

Gray, O'Brien, Haight, Landon, Cullen, and Werner, JJ., concur.

A Railway Company Employing an Independent Contractor to do construction or improvement work, the probable effect of which will not be injurious to another, is generally not answerable for the negligence of the contractor or his employés resulting in injury to third persons: See the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 411.

A City is Answerable for the Negligence of an Independent Contractor in leaving a street in a dangerous condition, since it is the duty of the city to keep its streets in a safe condition for public travel, and this duty cannot be delegated to another so as to relieve the city of its obligation. There is authority, however, to the contrary: See the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 417-420.

GATES v. BOWERS.

[169 N. Y. 14, 61 N. E. 993.]

COTENANCY—CONVERSION.—ONE COTENANT CANNOT USUALLY MAINTAIN REPLEVIN against his cotenant to recover possession of a chattel, nor conversion for its value, unless there has been a destruction of the property, or such a hostile appropriation thereof as to exclude or destroy the interest of the other tenant therein. (p. 532.)

COTENANCY—PARTITION OF PROPERTY.—WHERE PROPERTY IS ALIKE IN QUALITY AND VALUE and divisible by weight, tale or measure, one cotenant may take out his share without the assent of his cotenant, and may bring an action for the value of his share against a cotenant who, being in possession of the property, refuses to divide it. (p. 532.)

COTENANCY IN ANIMALS—DIVISION.—Where animals held in common are substantially alike in value, or their value depends solely on their weight, so that a division can readily be made, one cotenant may enforce a division against his cotenant or sue him for a refusal to make such division. (p. 532.)

EVIDENCE—IMPEACHING WITNESS—DEPOSITION.—A witness who testifies as to the character of an agreement between

him and one of the litigants may be contradicted by the introduction of his deposition taken in another case, in which he testifies that his agreement was of a different character. (p. 532.)

EVIDENCE—HEARSAY—CROSS-EXAMINATION.—A witness who, in contradiction of one of the defendant's witnesses, testifies concerning admissions made by the latter cannot on cross-examination be asked as to statements made to him by the defendant's lawyer. (p. 533.)

A WITNESS CANNOT BE DISCREDITED by showing that he was a hard debtor and had taken advantage of his creditor's pecuniary straits. (p. 533.)

C. A. Hitchcock, for the appellant.

Michael H. Kiley, for the respondent.

[16] CULLEN, J. The plaintiff alleged that he was the owner of an undivided half of a certain quantity of oats, wheat, and other farm produce, the other undivided half of which was owned by the defendant; that the property was in the possession of the defendant; that the plaintiff demanded from the defendant a division of the property, or that he would permit the plaintiff to take his half thereof; that the defendant refused to divide the same or to deliver any part thereof to the plaintiff, and that the defendant wrongfully converted to his own use the plaintiff's undivided half of said property. Judgment was demanded for the value of the plaintiff's share. The defendant answered admitting his refusal to divide the property or deliver any part thereof, and denying that the plaintiff had any interest therein. The plaintiff claimed title under an execution sale on a judgment against one Alfred J. Brown, whom he contended was a tenant in possession of certain farms of the defendant, working them on shares, the property in dispute being the produce of those farms. The defendant denied that Brown worked the farms on shares and [17] asserted that Brown was merely a servant working for wages. The terms of the agreement under which Brown worked the farms was the controverted issue in the case. The jury rendered a verdict for the defendant and the judgment entered on that verdict has been unanimously affirmed by the appellate division. No complaint is made as to the manner in which the case was submitted to the jury, and the attack on the judgment below is confined to the rulings of the trial court in the admission and rejection of evidence.

At the threshold of the case the respondent insists that the action cannot be maintained, and it is necessary to dispose of this objection, because, if well founded, it would render the

errors of which the appellant complains immaterial. While the general rule is that one of two tenants in common of a chattel cannot maintain replevin against his co-owner to recover possession of the chattel, nor conversion for its value unless the possession of the co-owner results in the destruction of the property or such a hostile appropriation of it as to exclude, destroy or ignore the interest of the other tenant therein (Osborn v. Schenck, 83 N. Y. 201; Hudson v. Swan, 83 N. Y. 552), there are exceptions to which the rule does not apply. Where the property is alike in quality and value, and divisible by weight, tale, or measure, one of several tenants in common may sever and take out his share even without the assent of his cotenant, and may maintain an action for the value of his share against a cotenant, who, being in possession of the property, refuses to divide it, or who converts it to his own use: Stall v. Wilbur, 77 N. Y. 158; Channon v. Lusk, 2 Lans. 211. It is, therefore, clear that the action was well brought as to the crops of the farms. The plaintiff, however, also sought to recover for his undivided half of twenty-four pigs. It may well be that in the case of a number of chattels of the same class, but where the individual chattels differ greatly in value, a tenant in common cannot enforce a division against his cotenant or sue him for refusal to make such division. But if the evidence in this case should show that these animals were substantially alike in value, or that their value depended [18] solely on their weight, so that a division might readily be made between the tenants, we think the same rule should apply to them as that which obtains in the case of the grain. This brings us to the appellant's exceptions on the trial.

Brown, the occupant of the defendant's farms, was a witness on his behalf. He testified that the agreement between himself and the defendant was that he should work for wages. Brown had previously been examined in proceedings supplementary to the execution under the sale on which the plaintiff claimed title. To contradict Brown, the referee, before whom the examination in such proceedings was had, testified that Brown swore on that examination that he did not know on what terms he was working the farms. The deposition of Brown containing this statement had been written out and was signed by him. This deposition was excluded against the plaintiff's objection and exception. This ruling was plainly erroneous, and it is not attempted to justify it on this appeal. It is claimed, however, that the error was harmless, as the plaintiff,

by the testimony of the referee, got the benefit of all the deposition would have shown if admitted. We cannot say this. The jury would naturally give much more weight to a written statement signed by Brown than it would to the memory or recollection of the referee as to what Brown had said. One Lucas, a witness on behalf of the plaintiff, in contradiction of Brown, testified that the latter said to him that he was to get half of the hay and crops on the defendant's farms. On cross-examination, against the plaintiff's objection and exception, he was permitted to testify to statements made to him by Kiley, the defendant's lawyer, that Brown could not run the farms because of his financial condition. This evidence was incompetent. What Lucas had testified to were Brown's statements. We are at a loss to imagine how anything that the lawyer had previously told Lucas had any bearing on the probability of Brown making the statements. The effect of this was to get before the jury the unsworn statement of the lawyer that Brown was not working the farms on shares and could not so work them, [19] because of his insolvent condition. Against the plaintiff's objection and exception Brown was allowed to testify that the witness Lucas was the man who had foreclosed a mortgage against him and bought in a farm of three hundred acres for seven dollars an acre. This, also, was plainly incompetent. Its only object was to discredit Lucas by showing that he was a hard creditor, and had taken advantage of Brown's pecuniary straits to obtain the farm for an inadequate price.

Other errors were committed in the admission of evidence to the injury of the plaintiff. It is not necessary to refer to them as they may not occur upon a new trial. It is not every error occurring on the trial that requires or even justifies this court in reversing a judgment where the trial as a whole has been fair and the rules of law have been correctly laid down. Possibly for no one of these errors, if it stood alone, would we feel constrained to grant a new trial, but taking them all together, and also the others, which we have not specified, we think that the plaintiff was substantially prejudiced in the trial of the cause by the admission of improper evidence and the exclusion of competent evidence, and that had correct rulings been made in these respects the verdict of the jury might have been different.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., Gray, O'Brien, Haight, and Werner, JJ., concur.

Landon, J., not sitting.

Judgment reversed, etc.

A Cotenant of Goods divisible by tale, measure or weight may, without the consent and against the will of his cotenant, rightfully take and appropriate to his own use, sell or destroy so much of them as he pleases, not exceeding his share, and by so doing effect pro tanto a valid partition. His co-owner who prevents him from so doing is guilty of conversion: Pickering v. Moore, 67 N. H. 533, 68 Am. St. Rep. 695, 32 Atl. 828; monographic notes to Marshall v. Palmer, 50 Am. St. Rep. 841; Bolling v. Kirby, 24 Am. St. Rep. 817. As to the right of a tenant to maintain trover against his cotenant, see Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652, and note; Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679.

PEOPLE v. BIESECKER.

[169 N. Y. 53, 61 N. E. 990.]

POLICE POWER.—THE LEGISLATURE CANNOT FORBID or wholly prevent the sale of a wholesome article of food. (p. 536.)

POLICE POWER — PREVENT FRAUD. — Legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use, and thus imposing upon consumers or purchasers, is valid. (p. 536.)

POLICE POWER—IMPURE FOOD.—IN THE INTEREST OF PUBLIC HEALTH the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale. (p. 536.)

CONSTITUTIONAL LAW. — AN ENACTMENT OF A STANDARD OF PURITY OF AN ARTICLE OF FOOD, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome. (pp. 536, 537.)

CONSTITUTIONAL LAW.—A STATUTE WHICH PROHIBITS THE PRESERVATION OF DAIRY PRODUCTS except by the use of salt, sugar, and spirituous liquors, and prohibits their sale, no matter how harmless the ingredients used may be, or how efficiently they attain their purpose, is an improper exercise of the police power. (pp. 537, 538.)

CONSTITUTIONAL LAW—PRESERVING FOOD.—A STATUTE IS NOT A VALID REGULATION which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. (p. 538.)

John C. Davies, attorney general, and Samuel S. Slater, for the appellant.

Herbert R. Limburger, Edward Lauterbach, and Henry L. Scheuerman, for the respondent.

[55] CULLEN, J. This action is brought to recover a penalty for the violation of section 27 of the agricultural law, as amended by chapter 534 of the Laws of 1900. The provisions of that section, which it is alleged the defendant violated, are as follows: "No person shall sell, offer or expose for sale, any butter [56] or other dairy products containing a preservative, but this shall not be construed to prohibit the use of salt in butter or cheese, or spirituous liquors in club or other fancy cheese, or sugar in condensed milk. No person or persons, firm, association, or corporation shall induce, or attempt to induce, any person or persons to violate any of the provisions of the agricultural law. Any person, firm, association, or corporation selling, offering, or advertising for sale any substance, preparation, or matter for use in violation of the provisions of the agricultural law shall be guilty of a violation of this act." The complaint merely follows the statutes, and alleges that the defendant advertised for sale a preservative called "preservaline" for use with butter, "which was neither salt to be used in butter or cheese, sugar to be used in milk, nor liquor to be used in club or fancy cheese," with intent that the said preservative should be used in butter to be offered and exposed for sale. The defendant demurred to the complaint, claiming that the statutory enactment quoted was unconstitutional and void, and in this contention he has been upheld by the special term and the appellate division.

We think the disposition of this case by the courts below was correct. It is not possible to define accurately the limits of the police power, the exercise of which is vested in the legislature, nor have the courts, as a rule, essayed that task further than to state in very general terms the nature and object of such power. Still, the power has its limitations, and those limitations have been to a large extent determined by the process of exclusion and inclusion, as the courts have upheld particular cases of legislation as valid exercises of the power, and in other cases have declared the legislation void. In People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, a statute absolutely prohibiting the manufacture and sale of oleomargarine or any compound as a substitute for butter and cheese

was held void. The statute having been subsequently amended so as to prohibit the manufacture or sale of any article or compounded as to imitate butter was upheld in People v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, as valid legislation to prevent fraud on purchasers [57] and consumers. In People v. Kibler, 106 N. Y. 321, 12 N. E. 795, a statute defining what should be deemed unwholesome or adulterated milk, and prohibiting its sale, was held constitutional. In People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823, a statute forbidding the manufacture or sale of vinegar containing any artificial coloring matter was also held valid.

From these cases the following propositions may be deduced: 1. That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food; 2. That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers is valid; 3. That in the interest of public health the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale. Though these principles, like most legal principles, are true only within limits, there would not seem much chance of conflict in their practical application except between the first and last. In the first of the milk cases (People v. Cipperly, 101 N. Y. 634, 4 N. E. 107, decided upon opinion of Learned, P. J., in 37 Hun, 319), it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated, and not unwholesome. The first oleomargarine case can be differentiated from this on the ground that the statute forbade its sale as a substitute to take the place of butter, and not as an unwholesome article of food. Still, that distinction is narrow, and I imagine that the sale and consumption of a well-known article of food or a product conclusively shown to be wholesome could not be forbidden by the legislature, even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits, and not of such a character as to practically prohibit [58] the manufacture

or sale of that which as a matter of common knowledge is good and wholesome.

The statute before us cannot be justified as an exercise of power to prevent fraud or imposition on buyers and consumers. Doubtless the legislature could provide that where butter contains any preservative except salt or sugar, the package should be clearly marked with a label stating such fact, and it might require any notice adapted to informing the public of the nature and treatment of the article offered for sale. This it has not done, but it has absolutely forbidden the sale. Nor is the legislation similar to that before the court in the vinegar case. In that case there was no prohibition of vinegar produced from other materials than cider. The forbidden thing was the use of artificial coloring matter, which was not a necessary ingredient of the article produced, but served the sole purpose of preventing the consumer distinguishing between the different kinds of vinegar. In the present case, the object of the forbidden article used is not to practice any deception, but to prevent decay in a product which, without the presence of some foreign substance, naturally becomes unfit for use in a very short period. The effect, therefore, of the statute is to prohibit the preservation of dairy products except by salt in butter and cheese and sugar in condensed milk, and their sale, no matter how harmless the ingredients used for that purpose may be, and no matter how efficiently they attain their purpose.

It is sought, however, to uphold this statute under the principle of the milk cases, on the theory that it is a legislative determination that preservatives other than salt and sugar are unwholesome adulterations of dairy products. As pointed out by the learned courts below, there is no legislative declaration to that effect. Passing, however, that consideration, there is a more serious difficulty in the way of such a course. If the statute had provided that the admixture of any substance with dairy products other than salt or sugar should be deemed an adulteration, and declared such dairy products when so adulterated unwholesome, the case would resemble [59] the milk case, and the question would be presented whether such far-reaching restrictions could be upheld as reasonable regulations in favor of public health. As to that question we express no opinion. But this provision of the statute is not aimed at adulterations. I cannot find in the agricultural law any general prohibition against adulterations in butter and cheese, al-

though there is an express provision to that effect in the case of milk. Section 26 seems to forbid the use of acids or other deleterious substance only in the case of imitation butter. Though, if I err in this and the application of the section be general, the provision under review is unnecessary so far as public health is involved. Section 407 of the Penal Code forbids the sale of adulterated food only (except in certain specified cases) when made without disclosing or informing the purchaser of the adulteration. It will be seen, therefore, that the sale of adulterated butter or cheese is not necessarily an offense, except so far as made such by the statutory enactment under review. That enactment does not make the introduction of a foreign substance an adulteration, nor an adulteration illegal, except in the case of a preservative. How, then, can it be said that the statute is intended to prevent adulteration or the introduction of foreign substance into butter or cheese when the sole test of criminality under it is that the substance is introduced for the object or with the effect of preserving butter or cheese? If the foreign substance has not this effect, no matter how deleterious it may be, the use of it does not violate this provision. It is plain, therefore, that this statute is solely aimed at the preservation of dairy products by the use of other substances than salt, sugar, and spirituous liquor. Why the use of sugar is forbidden in milk, salt in butter and cheese, and particularly why that of liquor is permitted in club or fancy cheese and forbidden in other cheese, it is difficult to understand on the theory that its object was the protection of the public health. The preservation of food and the arrest of its tendency to decay is certainly a proper and lawful object in itself. It is a work in which man has been engaged to [60] some extent from earliest history. It is the subject of large industries in this country, and the products of those industries are generally used by the community and are lawful objects of manufacture and sale. The industry has grown to an enormous extent. These are matters of common knowledge. There is doubtless in the prosecution of these industries danger of adulteration and of the use of processes injurious to public health. The regulation of these subjects for the protection of the public health and the prevention of imposition on consumers is within the power of the legislature, and the propriety of its exercise cannot be questioned. But while it may regulate, the legislature may not destroy, the industry, and that is not a valid regulation which in dealing with

the means of preserving food makes the preservation of food itself an unlawful act. Ingredients and processes may be prohibited as unwholesome or causing deception, but not solely because they preserve.

The judgment appealed from should be affirmed, with costs.

Parker, C. J., Gray, O'Brien, Haight, Landon, and Werner, JJ., concur.

Judgment affirmed.

Pure Food Laws.—The legislature has no constitutional right absolutely to prohibit a person from selling an article of food or drink, if it is one so universally conceded to be wholesome and innocuous that the court may take judicial notice of it. But it does have a right to either regulate or prohibit such sale, if there is a dispute as to the fact of the article's wholesomeness: State v. Layton, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171. For a further consideration of this question, see State v. Schlenker, 112 Iowa, 642, 84 Am. St. Rep. 360, 84 N. W. 698; monographic notes to Booth v. People, 78 Am. St. Rep. 261, 262; State v. Rogers, 85 Am. St. Rep. 400-403.

HAHL v. SUGO.

[169 N. Y. 109, 62 N. E. 135.]

MERGER OF CAUSES OF ACTION.—UNDER THE CODE PROCEDURE, all of the rights of litigants, both legal and equitable, so far as they are consistent with one another and affect the same parties, can be tried in one action and merged in a single judgment. (p. 540.)

CAUSES OF ACTION—RECOVERING LAND—LEGAL AND EQUITABLE RELIEF.—Where the plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of his house, such facts show but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. (p. 541.)

CAUSE OF ACTION.—THE RELIEF PRAYED FOR, or to which a plaintiff may be entitled, is no part of his cause of action. (p. 541.)

ACTION.—THE FAILURE OF A PLAINTIFF TO STATE FACTS TO SHOW THAT HE IS ENTITLED TO EQUITABLE RELIEF is no excuse for the commencement of an independent action upon the single cause involved in the first action. (p. 542.)

MERGER OF CAUSES OF ACTION.—IN AN ACTION TO RECOVER REAL PROPERTY, A NAKED LEGAL JUDGMENT establishing title and the right to possession, but which is unenforceable by execution, is a bar to a subsequent suit praying for equitable relief, since this might have been secured in the first action. (p. 544.)

Fred D. Corey, for the appellant.

Clark H. Hammond, for the respondents.

[111] WERNER, J. This suit was brought to obtain a decree to compel the defendant to remove that portion of the wall of [112] her building which encroaches upon the lands of the plaintiffs. The plaintiffs and the defendant are, and for many years have been, the respective owners of adjoining lots on the west side of Monroe street, in the city of Buffalo, between Howard street on the north and Clinton street on the south. In the summer of 1895 the defendant erected a two and one-half story brick house upon her lot, the northerly wall of which encroaches upon plaintiffs' lot as set forth in the findings of the trial court.

In 1896, after said house was completed, the plaintiffs brought an action in the supreme court to recover possession of the strip of land thus invaded by the defendant. The action was tried at a trial term, and a jury rendered a verdict in favor of plaintiffs. The defendant paid the costs and took a new trial under section 1525 of the Code of Civil Procedure. The action was tried a second time, with the same result, and judgment was entered on the eleventh day of January, 1898, establishing the plaintiffs' title in fee to the premises in dispute and their right to the possession thereof. That judgment contained a provision directing the defendant to forthwith remove from said premises all obstructions and erections of every kind placed thereon by her. In all other respects it was the ordinary judgment in an action to recover the possession of real property. That provision of the judgment was stricken out by the court on the defendant's motion, and thereafter the plaintiffs issued to the sheriff of Erie county an execution in the usual form. This execution was subsequently returned by the sheriff, with an indorsement thereon stating in substance that the strip of land described therein was occupied by a portion of the stone foundation and brick wall of defendant's house, and that it was impracticable for him to remove the same. After such return of the execution and before the commencement of the action at bar, the plaintiffs made a motion at a special term for an order directing the defendant to remove that portion of the wall of her house which encroaches upon the plaintiffs' land, which motion was denied.

[113] Thereupon the plaintiffs brought this action in equity to compel the defendant to remove said encroaching walls from

their land. The supreme court at special term granted the relief prayed for, and the judgment entered upon this decision was unanimously affirmed by the appellate division.

The appeal to this court brings up the question whether two separate actions can be maintained upon a single cause of action.

Section 3339 of the Code of Civil Procedure provides: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Under section 481 of the code, the requisites of a complaint are simply that it shall contain: 1. "A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition"; and 2. "A demand of the judgment to which the plaintiff supposes himself entitled."

These sections of the code and others, which need not be specifically referred to, clearly evince the legislative intent to strip our modern procedure of the cumbrous forms and distinctions which made the practice under the common law and the earlier statutes so burdensome in its details and so uncertain in its results. Upon examining that portion of the code which deals with actions to recover real property (chapter 14, title 1, article 1) we find that the old term "ejectment" has been discarded in the title and it is now entitled "Actions to recover real property." This change of name was, obviously, a part of the plan of the codifiers to reduce our practice to a simple and composite scheme under which all of the rights of litigants, both legal and equitable, so far as they are consistent with each other and affect the same parties, can be tried in one action and be merged in a single judgment. One of the essential features of such a scheme is to make separate provision for causes of action that are inconsistent with each other, or affect different parties or require different places of trial, and this has been done in section 484 and various other kindred sections of the code which specifies what causes of [114] action may be joined in the same complaint. It is true that in the chapter of the code relating to actions to recover real property the name and many of the incidents of the former action of ejectment still persist, but this is undoubtedly due to that conservatism of the law which has ever led our legislators and courts to use familiar names and to reason in old terms when enacting or construing statutes designed to pro-

duce reforms in our law and practice. We shall have occasion further on to refer more specifically to this chapter in its application to the concrete question presented by this appeal.

Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore, the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action: Pomeroy's Code Remedies, sec. 455.

The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of that land without plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested: Cagger v. Lansing, 64 N. Y. 417. The right of possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This, in turn, required equitable relief which, under proper pleadings and an appropriate method of trial, could have been [115] granted in the same action in which the title and right to possession were adjudicated: Corning v. Troy Iron etc. Factory, 40 N. Y. 191; Broiestedt v. South Side R. R. Co., 55 N. Y. 220. The fact that plaintiffs' complaint lacked the averments which would have apprised the court of their rights to equitable relief, and that the course of the trial furnished no indication that they intended to claim such relief, is no excuse for the commencement of a separate and independent action upon the single cause involved in the first action. It would be novel practice, indeed, to permit the correction of errors in that summary and extrajudicial manner.

The complaint in the first action did, as we have seen, pray that defendant be required to remove from the premises.

The addition to that complaint of a few simple allegations of fact would have established the necessary basis for equitable relief, and that could have been accomplished under the ample power of amendment provided by section 723 of the code. Had the complaint been so amended, the case could have been tried according to the familiar practice which prevails in cases where the issues are to be passed upon by the jury, and the court is called upon to grant equitable relief: Davis v. Morris, 36 N. Y. 572. The plaintiffs chose not to avail themselves of these rights and proceeded to trial precisely as though they claimed, and were entitled to, nothing but legal relief. In the judgment entered upon the second verdict in their first action the plaintiffs did insert a provision for the equitable relief which they now claim, and which was granted in the courts below in the action at bar. This was properly stricken out by the court because, even if the complaint was one which would have justified such relief, the plaintiffs had not pursued the practice which gave the court the right to grant it.

If we assume, however, that the plaintiffs were entitled to such equitable relief in the first action, and that the court had the power to grant it under the practice adopted, then it was error for the court to have expunged it from the judgment, and the plaintiffs should have appealed from the erroneous decision: Wright v. Nostrand, 94 N. Y. 31. In total disregard [116] of this familiar rule of practice the plaintiffs proceeded to issue execution and collect the costs therein provided for, although they were then as fully cognizant of the facts which rendered fruitless, as they claimed, a mere judgment at law, as they were later on when the action at bar was commenced.

When the sheriff made his return, stating that it was impracticable for him to remove said wall, the plaintiffs made a motion to compel the defendant to remove the same. It requires no discussion to show that this motion was properly denied. If plaintiffs were entitled to the relief therein sought, it was properly a part of their judgment in the first action, and, as already stated, their motion should have been to vacate that insufficient judgment, and to reopen the case so as to invest the court with the power to proceed in the regular way. But assuming that the court could have granted the desired relief upon an independent motion, plaintiffs' only remedy in case of a denial thereof was by appeal: Wright v. Nostrand, 94 N. Y. 31.

In the light of these antecedents of the case at bar it seems plain to a demonstration that there is no foundation for it, unless the "action to recover real property," formerly known as "ejectment," is an exception to the comprehensive scheme of the code to abrogate the former distinctions between actions at law and suits in equity. It is urged on behalf of the plaintiffs that it is the usual practice in actions of ejectment to first establish title at law and then, if the legal remedy is inadequate, to proceed in equity for such further relief as may be authorized by the facts of the case. The very authorities cited in support of this argument prove its fallaciousness. Corning v. Troy Iron etc. Factory, 40 N. Y. 191, and Baron v. Korn, 127 N. Y. 224, 27 N. E. 804, were cases in which the equitable remedy was held to have been properly invoked in the first instance, although it was contended in the former, as it is here, that it was proper for the plaintiff to establish title at law before commencing his suit in equity. In Troy etc. R. R. Co. v. Boston etc. Ry. Co., 86 N. Y. 128, the action was based upon a single trespass without allegation or proof [117] of irreparable injury, and it was to this state of facts that the court applied the dictum that an action at law should be had before a suit in equity will be entertained because "for aught that now appears, one action at law will suffice." In Wheelock v. Noonan, 108 N. Y. 186, 2 Am. St. Rep. 405, 15 N. E. 67, also an action for trespass, the court did extend its equitable aid on the ground that an action at law would not furnish an adequate remedy. In referring to the general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, the learned writer of the opinion in this court said: "Where the facts are in doubt and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required." Illustrations of the rule that both legal and equitable relief may be had in the same action may be found in the earlier cases of Phillips v. Gorham, 17 N. Y. 270, Lattin v. McCarty, 41 N. Y. 107, and Wright v. Wright, 54 N. Y. 437, although it must be conceded that proper discrimination has not always been made between single and several causes of ac-

tion, as distinguished from different kinds of relief upon one cause of action.

Turning again from the authorities to the code, the reason for the retention of some of the incidents of the former action of ejectment is apparent. Many, if not most, of the cases to recover real property are actions at law, pure and simple, in which the right of possession, based upon proof of title, can be adequately enforced by execution. The action may be maintained by the landlord against his tenant; or by one whose land unencumbered by buildings is withheld and can be fully restored under a judgment establishing his right of possession; or by another within the limits of whose land structures have been erected by a wrongdoer which pass as a whole to the plaintiff and follow the right of possession of the land. These incidents of the purely legal side of an action to [118] recover real property are not inconsistent with the equitable remedies which may and should be invoked when, as in the plaintiffs' first action, the naked legal judgment establishing title and the right to possession is claimed to be unenforceable by execution.

The application of these principles to the case at bar requires the reversal of the judgment of the courts below and the dismissal of the plaintiffs' complaint; but in view of the hardships visited upon the plaintiffs by the palpable and continuing wrong of the defendant, the reversal should be without costs.

Parker, C. J., Gray, O'Brien, Landon and Cullen, JJ., concur.

Haight, J., dissents.

Judgment reversed, etc.

A Single and Entire Cause of Action cannot be divided into several claims and separate actions maintained thereon: Reilly v. Sicilian etc. Pav. Co., 170 N. Y. 40. post. p. 636, and cases cited in the cross-reference note thereto, 62 N. E. 772. Issues of an equitable and legal nature may be embraced in one action: Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 670; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. See, in this connection, Vail v. Hammond, 60 Conn. 374, 25 Am. St. Rep. 330, 22 Atl. 954; Kirkwood v. First Nat. Bank, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016; Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; Beronio v. Ventura County Lumber Co., 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958.

The Demand in a Complaint is no part of the action, and does not give it character. The facts alleged do this, and the plaintiff is entitled to such relief as they warrant: Strain v. Babb, 30 S. C. 342, 14 Am. St. Rep. 905, 9 S. E. 271.

PEOPLE v. MILLER.

[169 N. Y. 339, 62 N. E. 418.]

APPEALS—CRIMINAL CASES.—UNDER THE NEW YORK CONSTITUTION, the provisions which limit appeals to the court of appeals to certain classes of cases have no application to criminal cases. (p. 547.)

INDICTMENT FOR LARCENY.—UNDER THE NEW YORK PROCEDURE, an indictment in the common-law form charging larceny is still good. (p. 548.)

THE OFFENSE OF LARCENY AT COMMON LAW is established by proof that the defendant obtained possession of the property by some trick, fraudulent device or artifice, animo furandi, with the intention of subsequently appropriating it to his own use. (p. 553.)

FALSE PRETENSES, IN CRIMINAL LAW, AS A MEANS OF OBTAINING THE TITLE OR POSSESSION OF PERSONAL PROPERTY, import an intentional false statement concerning a material matter of fact, upon which the complainant relied in parting with the property or in delivering the possession. (p. 554.)

A CRIMINAL CHARGE OF OBTAINING MONEY BY FALSE PRETENSES cannot be based upon fraudulent statements wholly promissory in their nature, and containing no representation as to any existing fact. (p. 554.)

EMBEZZLEMENT.—IF A PERSON HONESTLY RECEIVES THE POSSESSION OF THE GOODS, chattels or money of another upon any trust, express or implied, and, after receiving them, fraudulently converts them to his own use, the offense is embezzlement and not larceny. (p. 555.)

FALSE PRETENSES.—IF THE POSSESSION OF PROPERTY IS OBTAINED BY FRAUD, and the owner intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as in law are false pretenses. (p. 555.)

LARCENY.—IF THE POSSESSION OF PROPERTY IS FRAUDULENTLY OBTAINED, with the intent on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny. (p. 555.)

LARCENY.—WHERE A PERSON OBTAINS POSSESSION OF MONEY BY A FRAUDULENT DEVICE, promissory in character, with the intent at the time of appropriating the money to his own use, the owner merely parting with the custody for a special purpose, the offense is larceny. (p. 556.)

LARCENY.—AN INSTRUCTION THAT THE DEFENDANT would be guilty of larceny if he obtained money by false pretenses as a part of a device or scheme, trick or artifice, intending to appropriate it to his own use, is correct. (p. 557.)

LARCENY—ERROR WITHOUT PREJUDICE.—A REFUSAL TO CHARGE that to convict the defendant of larceny he must at the time he received the money have formed an intent to steal it, and charging that such intent might be formed any time

before a certain date, is not prejudicial error, where the evidence permits but one inference, which is that the defendant intended to appropriate the money at the time he received it. (p. 559.)

John F. Clarke and Martin W. Littleton, for the appellant.

Frederick B. House, Louis J. Vorhaus, and R. A. Ammon, for the respondent.

342 O'BRIEN, J. The defendant was convicted of the crime of grand larceny and sentenced to imprisonment in the state prison for ten years, but upon appeal the court below has reversed the judgment of conviction and granted a new trial, and the people have appealed to this court from that order. If this were a civil action the case would not be appealable to this court, since by section 9 of article 6 of the constitution, appeals to this court are limited to three classes of cases—namely, final judgments in actions, final orders in special proceedings, and orders granting new trials on exceptions where the appellant stipulates that on affirmance judgment absolute shall be rendered against him. It is obvious that the 343 appeal in this case does not fall within any of the three classes specified. It is an appeal from an order granting a new trial in a criminal case, and if the limitations upon appeals to this court, specified in this provision of the constitution, have any application to criminal cases, then clearly this court would have no jurisdiction to review the order in question, but we think that it is very obvious from the language of the limitations themselves that they have no application to appeals in criminal cases. It is true that judgments in capital cases are excepted from the operation of this provision of the constitution. The exception was probably unnecessary and inserted in the text from abundant caution, otherwise, as supposed, it might be claimed that appeals in such cases directly from the trial court had been abolished and our right to review the facts in such cases abrogated. The exception was, therefore, inserted in order to preserve the right of appeal in such cases, as it existed before the recent constitution was enacted. This was the plain purpose of the reference in the section to capital cases, and the fact that an unnecessary exception in regard to such cases was inserted in the provision cannot, of course, include within the limitations other criminal cases not referred to. The limitation upon appeals to this court contained in that section manifestly applies to civil cases only. Nothing contrary to this proposition was decided in People v. Helmer,

154 N. Y. 596, 49 N. E. 249, though certainly the question was discussed. But it will be seen by an examination of the case that no question of jurisdiction was involved or decided, and the subsequent decisions in this court indicate very clearly that there was no intention to decide any such proposition in that case: People v. Willis, 158 N. Y. 392, 53 N. E. 29; People v. Klipfel, 160 N. Y. 371, 54 N. E. 788; People v. Kane, 161 N. Y. 380, 52 N. E. 946; People v. Drayton, 168 N. Y. 10, 60 N. E. 1048. In the three cases first cited it will be seen that this court could not have taken jurisdiction of the appeal if the limitations prescribed in the constitution had any application; and in the case last cited it was expressly stated in the opinion that the limitations referred to have no application to a criminal case, and that the jurisdiction of this court [344] to hear appeals of this character rests entirely upon the provisions of section 519 of the Code of Criminal Procedure, re-enacted since the present constitution went into effect. This section gives an appeal in this case to the people as matter of right, and so we have no doubt as to our jurisdiction to review the order in question.

The indictment charged the defendant with grand larceny in two counts. The first count charged the defendant with a felonious appropriation to his own use of one thousand dollars in money which he then and there had in his possession, custody, and control as bailee, servant, attorney, agent, clerk, and trustee of the complainant. This charge was abandoned on the trial and no further reference need be made to this count in the indictment. The second count charges the defendant with larceny in the common-law form—namely, that "on the sixteenth day of November, in the year of our Lord 1899, at the borough and in the county aforesaid, with force and arms, one thousand dollars in the money and lawful currency of the United States of the value of one thousand dollars of the goods and chattels and property of one Catherine Moser, then and there being found, feloniously did steal, take, and carry away, to the great damage of the said Catherine Moser, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity." The defendant was, therefore, charged with the crime of which he was convicted in proper form. An indictment in the common-law form charging larceny is still good, and the defendant's conviction can be upheld if the charge was sustained at the trial by the proofs. It is

stated in the order appealed from that the judgment was reversed for errors of law and not for errors or questions of fact, or as matter of discretion, and that the court had reviewed and considered all the questions of fact in the case and found no error therein. This provision of the order means, of course, that the learned court below had examined the evidence given at the trial to prove the various acts and [345] doings of the defendant, which it is claimed constituted the crime charged, and found that they were sufficiently established, but reversed the judgment on questions of law. In this aspect of the case the duty of this court is very clear and simple. We are to determine whether there is any evidence in the record which could properly have been submitted to the jury in support of the charge of larceny, and if so, whether there are any exceptions to the rulings of the court upon the trial which warranted the learned court below in reversing the judgment. The fundamental question in the case is whether the proof given at the trial and embraced in the record now before us warranted the trial court in submitting the case to the jury. The defendant's counsel, at the close of the evidence, requested the court to discharge the defendant and dismiss the indictment, upon the ground that no proof had been given to sustain the charge of a common-law larceny, and his request in this respect was denied and exception taken. The same point was raised by other requests before the case was finally submitted to the jury.

The evidence at the trial to prove the offense charged took a wide range and covered a broad field of inquiry, and although it related to only about eight months of the defendant's career, there is little, if any, dispute about the facts. They are stated very fully and fairly in the two opinions rendered in the court below (People v. Miller, 64 App. Div. 450, 12 N. Y. Supp. 253), and, therefore, a mere general outline of the defendant's transactions will be quite sufficient here for all the purposes of this appeal. The defendant's first appearance before the public was as a member of a prominent church in Brooklyn, in the work of which he seems to have taken an active part, since he was at one time the president of the Christian Endeavor Society. His standing in the church gave him the opportunity to form the acquaintance of the young men attending the Sunday-school, with many of whom he was soon on intimate terms. Many of these young men became his first victims or customers in a financial scheme which he had formed

in order to appropriate to himself the money of the credulous and unwary. [346] His plan was first put into operation in a very simple way in March, 1899, when he announced that he possessed such means of obtaining inside information of great money-making operations in the New York Stock Exchange and the exchanges in other cities that he was able to make and pay large profits to parties who would deposit money with him. The scheme proposed to depositors by defendant was that for every ten dollars or more deposited with him he would pay ten per cent weekly until the deposit was withdrawn. The depositor was to be guaranteed against loss by what he called surplus, and the deposit could be withdrawn at any time upon a notice of one week. He represented himself as the manager of what is styled the "Franklin Syndicate," and all his advertisements, circulars, and receipts had upon their face a picture or portrait of Dr. Franklin, under which was printed one of the apothegms attributed to that eminent philosopher, namely: "The way to wealth is as plain as the road to market." At first he carried on his operations in a candy store, where he met such persons as he was able to persuade to invest, but as soon as the project had fairly started he engaged the top floor of a two-story frame house in a residential district. This place for the conduct of his operations is described by one of the witnesses as a small hall room with three chairs, a small table, a desk and a safe. He paid the promised weekly dividend promptly and the allurement of such enormous profits made every depositor a missionary to propagate the new theory by means of which wealth could be easily and speedily attained. The scheme, of course, could not succeed without a constant accession of new depositors, and they came. The project grew and expanded with amazing rapidity. The wildest dreams that the defendant could possibly have entertained were more than realized. In the month of October following the commencement of his operations, he was obliged to rent the whole house, and there he established a correspondence and literary bureau under the management of a person who understood the way to reach the public through the public press, as well as by attractive advertisements, [347] circulars, and other publications that were scattered broadcast throughout the city, the country, and were sent even to foreign lands. Immense sums of money were expended in purchasing space in the public press, and even in financial periodicals, announcing the amazing success of the project. The public through-

out the country read and believed, a striking proof of the extent to which men may be influenced even in their pecuniary interests by the organs of public opinion. When the checks for dividends were sent out to the depositors, they were always accompanied by circulars or newspapers containing highly colored descriptions of the astonishing success of what was called the "Syndicate." In October and November the scheme had reached its highest development. The house was filled with clerks, all working from 9 in the morning until 10 at night, drawing dividend checks, receiving money and sending out circulars and newspapers. The streets were daily crowded with depositors; two lines were daily formed, one of depositors and the other to draw dividends, and, of course, the depositors were encouraged by the success of their neighbors who were receiving such enormous rewards. Money was piled in heaps about the place, upon the counter and the floor. People remained in the line for hours awaiting their turn to reach the house to deposit their money. The crush was so great, as the proof tended to show, that the stoop broke down and a new one had to be erected. Money was received to the amount of over sixty thousand dollars on some days. The mail brought from all parts of the country, daily, hundreds of letters containing deposits, and twenty or more clerks were employed writing dividend checks, the defendant's name being attached by means of a rubber stamp. On some days the dividends paid out amounted to as much as thirteen thousand dollars. No books were kept and no stocks or collateral were ever seen. The place had no telephone or any of the furnishings of an ordinary office. At one time highly colored advertisements were inserted in six or seven hundred papers throughout the United States, for which the [348] defendant paid over twenty thousand dollars. The character of these advertisements need not be stated. It is sufficient to say that they were so framed as to attract the ignorant and credulous. About the 24th of November, 1899, a little more than eight months from the time that the scheme was first put into execution, the defendant had received over one million dollars in deposits from over twelve thousand depositors throughout the United States, Canada, and there were even a few from Europe. He had paid out large sums of money in dividends, as that was an essential part of the scheme; but he had been so successful in reaching the ear of the public that he had on hand large sums of money. On the date last mentioned he closed the con-

cern, made a general assignment for the benefit of creditors and fled to Canada, taking with him one hundred thousand dollars in United States bonds, which he had just purchased, and the proceeds of a bank certificate of deposit for the same amount, which he procured to be cashed. This, in brief, is the history of the defendant's operations, and, although they savor more of romance than reality, the facts were established at the trial by incontestable proof. The defendant never in fact had any connection with the stock exchange, and did not purchase or deal in securities of any kind. He had in fact no business except the preparation and distribution of circulars and advertisements, the receipt of money from the various depositors and the distribution of the so-called dividends. The whole project from beginning to end was a transparent swindle.

The complainant in this case was one of the persons induced to become a depositor by the flattering promise of large dividends which the defendant held out to the public through the press and otherwise. On the 12th of October, 1899, she deposited one hundred dollars and received a weekly dividend of ten dollars until about the time that the concern collapsed. On the 16th of November she was induced to deposit with the defendant the one thousand dollars mentioned in the indictment. She received a receipt therefor, which was numbered 12,217. The receipt on its face purported to give her [349] an interest in the Franklin Syndicate. It stated that the principal was guaranteed against loss by surplus, and that it could be withdrawn at any time upon one week's notice and the return of the receipt, and that ten per cent would be paid weekly on the deposit until the principal was withdrawn. The circumstances under which she delivered the money to the defendant will appear from her own statement of the transaction: "After reaching the place where Miller was sitting, I gave him my thousand dollars. This thousand dollars was in United States currency; it was in bills. I do not wish to mention where I got the thousand dollars from. I asked him if he would insure the money against loss, and he said the coupon was insurance enough. By the coupon he referred to the paper which he gave me. No person acting for the defendant asked me to put in the thousand dollars. I conceived the idea myself that it would be a good thing to put in a thousand dollars and receive a hundred dollars a week interest. There was no representation made to me from the Syndicate, but I read something in the papers somewhere, I do not

know where, that Vanderbilt, Gould, and all of them made money in Wall street. I knew this was true, and I thought this money was to be used for the same purpose, and I would get the benefit of it." There can be no doubt that the complainant delivered the money to the defendant for the purpose of speculation, with the understanding that the deposit should be returned with the accumulated profits, and had the defendant actually used the money in speculation, however improvident or reckless, and lost, his act would not amount to larceny. But it is plain that he never intended to use the money in speculation. The sole purpose of the pretense and device referred to was to enable him to get possession of the money of others and to appropriate it to his own use. The jury could have so found, and their verdict imports such a finding. The jury were authorized to find, and by their verdict have found, that the complainant did not intend to part with the title or the possession of the money, but merely to give the defendant the custody [350] of it for the purposes specified. It was competent for them to find that the complainant did not intend to part with her title to the money to the defendant, and while she may have intended that he could give title to it to some third person, in order to engage in speculation, yet as nothing of that kind actually happened, or was intended on the part of the defendant, that consideration is of no importance. The real question is whether, upon any view of the evidence which the jury was authorized to take, the defendant could be convicted of larceny as that offense was known at common law. If so, then the verdict should be sustained.

Larceny, as defined by section 528 of the Penal Code, embraces every act which was larceny at common law besides other offenses which were formerly indictable as false pretenses or embezzlement. The offense of larceny at common law is established by proof on the part of the prosecution showing that the defendant obtained possession of the property by some trick, fraudulent device, or artifice, animo furandi, with the intention at the time of subsequently appropriating it to his own use. This proposition is well sustained by authority in this and other courts, both before and since the enactment of the Penal Code: People v. Laurence, 137 N. Y. 517, 33 N. E. 547; People v. Morse, 99 N. Y. 662, 2 N. E. 45; Justices etc. v. People, 90 N. Y. 12, 43 Am. Rep. 135; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Hildebrand v. People, 56 N. Y.

394, 15 Am. Rep. 435; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; People v. McDonald, 43 N. Y. 61; Commonwealth v. Barry, 124 Mass. 325; Regina v. Buckmaster, 16 Cox C. C. 339. We think that the jury could find upon the proofs in this case, and must be deemed to have found by their verdict, that the defendant received the money in question by means of a trick, device, or artifice, with the intention at the time of appropriating it to his own use. The manner in which the defendant obtained possession of the money was none the less a fraudulent device, trick, or artifice because his operations were conducted upon a large scale and assumed some of the forms of business. It was plainly intended from the beginning, and at every stage of the defendant's operations [351] to get possession of the money of others by means of fraudulent devices and then appropriate it to his own use. This was larceny at common law, and is still larceny under the Penal Code. The cases cited above sustain this proposition and differ in no essential respect from the case at bar.

The learned counsel for the defendant contends that the proof in this case established no criminal offense other than obtaining money by fraudulent pretenses, and since that offense was not stated in the indictment, the defendant was improperly convicted, and such was evidently the view of the majority of the learned court below. It is very doubtful, however, if such a charge could be sustained by the proof in this case. False pretenses as understood in the criminal law, as a means of obtaining the title or possession of money or personal property, imports an intentional false statement concerning a material matter of fact upon which the complainant relied in parting with the property or in delivering the possession. It would be difficult to show that the defendant in this case made any material false statement concerning any existing fact. His statements were all promissory in nature and character. He represented to the public very little, if anything, concerning any fact existing at the time. His statements consisted in persuading the depositors that he could and would obtain for the use of their money large profits in the form of dividends. These statements were all in the nature of promises, and although they were very effective in producing the result desired by the defendant, they would hardly constitute the basis for a criminal charge of obtaining money by false pretenses: Ranney v. People, 22 N. Y. 413; People v. Blanchard, 90 N. Y. 314; People v. Baker, 96 N. Y. 340, 348; Therasson v. People,

82 N. Y. 238. Under these authorities it would be very difficult to frame an indictment against the defendant for obtaining money by false pretenses, or to sustain it by proof at the trial. The distinction between larceny, false pretenses, and embezzlement was concisely stated in the brief opinion of the court in Commonwealth v. Barry, 124 Mass. 325: "If a person honestly receives the possession [352] of the goods, chattels, or money of another upon any trust, express or implied, and, after receiving them fraudulently converts them to his own use, he may be guilty of the crime of embezzlement, but cannot be of that of larceny, except as embezzlement is by statute made larceny. If the possession of such property is obtained by fraud, and the owner of it intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as in law are false pretenses. If the possession is fraudulently obtained, with intent on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny." In this case the complainant's money was not obtained by the defendant by such means or representations as in the criminal law constitute false pretenses. But the jury could have found that he did obtain the money by means of a fraudulent device, with the intent on his part at the time he received it to convert it to his own use; and also that the complainant intended to part with her possession merely, and not with the title, and so the verdict convicting the defendant of larceny was warranted by the evidence.

The case of People v. Dumar, 106 N. Y. 502, 13 N. E. 325, does not support the contention of the learned counsel for the defendant that the proof in this case was not sufficient to warrant a conviction for larceny. It was held in that case that the charge of larceny in the common-law form could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. It will be seen that in that case there was a false representation concerning a material fact upon which the person parting with the property relied, and, hence, the real offense was false pretenses and not larceny, as it was understood at common law. The defendant in that case could have been indicted for false pretenses, since the

false statements related [353] to facts, and were not as here promissory in their character. The case at bar cannot be distinguished in any essential respect from that of People v. Laurence, 137 N. Y. 517, 33 N. E. 547. The only distinction that can be made is that the complainant in the case referred to, when parting with the cars, could not have intended to part with the title, but, on the contrary it intended that the identical cars should be returned when the necessary changes were made. But in the case at bar, the thing delivered to the defendant was money, which has no earmark. It lost its identity when delivered to the defendant, and the complainant of course could not have intended that the identical bills which were delivered to the defendant should be returned to her. The difference in the two cases, if any, is founded entirely upon the different character of the property which the accused obtained. That distinction would not seem to be material. The defendant in that case, as in this, got possession of the property by means of a false pretense or fraudulent device promissory in character, and, therefore, not amounting to the crime of false pretenses or embezzlement, but since in both cases his intent at the time was to appropriate the thing to his own use, it was common-law larceny. In both cases the fraudulent device consisted in deceiving the owner of the property, not as to any existing fact, but with respect to intentions as to future operations with the property. The fact that in the case referred to the thing stolen was a car and in this case money can make no difference, since the owner in both cases parted with the property, and the accused obtained it under circumstances essentially the same. The offense which the defendant was guilty of was larceny rather than false pretenses or embezzlement, since he procured the money by operating upon the minds of depositors by promises of large profits as a fraudulent device to get possession of the money, and there was no agency, bailment, or trust to give any color of right to his original possession. Moreover, the same act may sometimes amount to larceny at common law, and embezzlement under the statute, and when it does, the offender may be prosecuted upon either charge, at the option of the [354] people, when the two offenses are of the same grade, and do not require a different measure of punishment: 2 Bishop's Criminal Law, 7th ed., secs. 328, 329, and notes. We are, therefore, of the opinion that the evidence was sufficient to submit to the jury on the charge of larceny, and that it sustains the verdict.

The distinction between larceny and false pretenses is well illustrated by the case of Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589. In that case, it was held, after a most thorough discussion of the authorities, that the offense committed by the accused was false pretenses, and not larceny. The reasons for that conclusion are very plain and obvious. The accused was indicted and convicted for selling a large quantity of malt which had been shipped to him in New York from Ohio. The property was accompanied by a bill of lading, which was delivered to the accused, and vested in him the legal title and possession of the property. The shipper intended to vest the consignee with the title so as to enable him to sell the property and account for the proceeds. Beyond all doubt the owner in that case intended to part, and did part, with the legal title and possession of the property. The accused intended to acquire the title and possession, otherwise the transaction which contemplated a sale and delivery of the malt to third parties could not have been effectuated at all. The legal title and possession of the property having passed to the accused, he could not, of course, have been guilty of larceny, although the transaction in the first instance might have been induced by false representations. But the case at bar presents an entirely different transaction. The complainant did nothing except to deliver the money to the defendant. She did not intend to loan it to him or to vest him with the title, but with the custody only, and that for a specific purpose. It was very much like the transaction in the Morse case, where the money deposited was to be returned, and where its appropriation by the custodian to her own use was held to be larceny. The complainant in the case at bar undoubtedly intended to part with the manual possession of the money, but even that [355] purpose and intention on her part was the result of a trick or fraudulent device on the part of the defendant. Her consent to part with the manual possession of the money having been procured by the defendant's fraudulent device, it was in law no consent at all. The fact that the plaintiff was led to believe that the defendant was the manager of a syndicate or corporation only emphasizes the nature and character of the device, since there was in fact neither a corporation nor a syndicate, but the defendant was conducting the operations as an individual under color of names and titles intended only to deceive. I have not been able to find any case of controlling authority where it was held that the transaction amounted to false pretenses on the part of the ac-

cused as distinguished from common-law larceny that is not readily distinguishable from the case at bar upon the facts.

The only exceptions in the record that call for any notice here were taken to the charge of the learned trial judge, and his refusal to charge certain propositions presented by the learned counsel for the defendant. After the jury had deliberated for some time they came into court for further instructions and for an explanation of a part of the charge as made which they stated to the court. In response to the request, the court charged, in substance, that the defendant would be guilty of larceny if he obtained money by false pretenses as a part of the device or scheme, trick, or artifice, intending to appropriate it to his own use. The defendant's counsel requested the court to charge that if the defendant obtained the money by false representations he could not be convicted under the indictment, which request was refused, and the defendant's counsel excepted. We do not think that this exception presents any legal error. It is based wholly on the statutory meaning of the terms "false representations" and "false pretenses." False pretenses in the general sense, as distinguished from the statutory sense, are necessarily a part of every device, trick, or artifice for feloniously obtaining the possession of money or property, and what the court stated was that if the defendant obtained the money by such device, [356] though it involved a false pretense in the general sense, it could be found to be larceny. So, also, false representations, as the defendant's counsel used the term and as the court understood it, do not necessarily imply an indictable fraud, since we have seen that the false statement in that case must relate to some existing material fact. The false pretenses referred to in the charge and the request were evidently those false promises of large profits held out by the defendant to the depositors, and as they were not indictable, and only constituted a part of the trick or artifice, the exception is not good.

The defendant's counsel also requested the court to charge the jury that in order to convict the defendant they must find that at the time he received the money he formed an intent to steal it. This request was refused, and the court charged that the defendant was guilty of larceny if he formed such intent at any time prior to the 24th of November, and an exception to the refusal and to the charge as made was taken. Considered as an abstract legal proposition, the request was doubtless correct, and if the refusal of the learned trial judge to charge

it could possibly have prejudiced the defendant, the reversal of the judgment by the learned court below would have to be sustained. But it is plain, we think, that the refusal to charge this proposition, and the charge as made, could not possibly have prejudiced the rights of the defendant. The evidence in the case really permitted but one inference as to the defendant's purpose, and that was that he intended to appropriate the money at the time he received it, and whatever intention is imputable to him must necessarily have existed at the time that the money was delivered to him. The jury could not have found upon the evidence that he then received it innocently or rightfully, and that during the seven or eight days that followed, preceding the collapse, formed for the first time the intention of converting it to his own use. There was nothing in the proof to authorize the jury to find that the intent to steal was formed subsequent to the receipt of the money. Manifestly, he entertained that [857] purpose at the time that the money was delivered to him, or he never entertained it. Moreover, the exceptions referred to, we think, come fairly within the scope of section 542 of the Code of Criminal Procedure, which requires the court to give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the parties. Our conclusion, therefore, is that the order of the appellate division should be reversed and the judgment of conviction affirmed.

Parker, C. J., Gray, Haight, Landon, Cullen, and Werner, JJ., concur.

LARCENY.*

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I. Scope of Note.

As in the note on "Embezzlement," in 87 American State Reports, we shall confine ourselves to a treatment of the essential elements which go to make up the crime of "Larceny." This of itself is a large subject, particularly in view of the many technical distinctions which have come to be engrafted upon this offense, especially as relates to the questions of trespass and intent.

II. Definition.

Larceny may, in general, be defined as the taking by trespass and carrying away of the personal property of another, without his consent, with the intent to deprive the owner thereof: See State v. Gray, 37 Mo. 463; Fields v. State, 6 Cold. 524; Williams v. State, 34 Tex. 558; Quitzow v. State, 1 Tex. App. 65. It is needless to cite authorities upon this point, since most of the cases which will be subsequently cited define the crime. This general definition has been altered slightly by statute in some of the states. These changes will be referred to as we proceed. But in the main the elements here mentioned are essential, and we shall treat them in the order in which they appear in the definition. Thus, larceny is (1) the taking (2) by trespass (3) and carrying away (4) of the personal property (5) of another (6) without his consent, (7) with the intent to deprive the owner thereof.

III. Taking.

a. In General.—In order to constitute larceny, there must be a taking of the personal property, either actual or constructive: Fulton v. State, 13 Ark. 168; Pennsylvania v. Campbell, Add. 232. The mere possession of property was deemed not to be enough, in State v. Newman, 9 Nev. 48, 16 Am. Rep. 3. The mere possession of property, with the intent to steal, is not larceny until the intent has ripened into an act. The property must be taken. To constitute one a taker of property, it is not necessary that he should actually take it into his physical possession, or that he be personally present at the time and place of the actual taking. It is sufficient if at the time of the taking he is doing something to aid and assist the one who does the actual taking: Wright v. State, 18 Tex. App. 358; Gentry v. State, 24 Tex. App. 478, 6 S. W. 321; Willis v. State, 24 Tex. App. 586, 6 S. W. 857.

Marking hogs with one's mark with the intent to claim them as his own is sufficient: Scott v. Harbor, 18 Cal. 704. When an accused, who is authorized to take a steer worth eight dollars, without the owner's consent takes a much more valuable animal, with the fraudulent intent of keeping it, the crime is complete: Peck v. State, 9 Tex. App. 70. Enticing a hog for twenty yards on the owner's premises by dropping corn, and then abandoning it, is not larceny. The possession of the owner must be so far changed

that the dominion of the trespasser shall be complete: Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67. Lifting a pocket-book partly from the pocket of another person, with the intent to steal it, is a sufficient taking and carrying away, although it is not removed from the pocket: State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Flynn v. State, 42 Tex. 301. To take signifies to lay hold of, seize or grasp in some manner, and this taking must be with a felonious intent: State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Gettinger v. State, 13 Neb. 308. Taking change for five dollars and then refusing to deliver the five dollars is larceny: State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. The taking and destroying of an animal to conceal theft is larceny: Stegall v. State, 32 Tex. Cr. Rep. 100, 40 Am. St. Rep. 761, 22 S. W. 146. Killing a cow without the intent to steal it, and then taking the carcass with fraudulent intent, is not cattle stealing: Nightengale v. State, 94 Ga. 395, 21 S. E. 221. The mere shooting of an animal without otherwise touching it is not larceny: State v. Seagler, 1 Rich. 30, 42 Am. Dec. 404. But in McPhail v. State, 9 Tex. App. 164, it was held that the killing and skinning of another's cattle, with the intent to appropriate the hides, constituted theft of the animals. The suing out of a writ for a fictitious demand, and thus getting possession of the property of another, with the intent to defraud the owner, is larceny: Commonwealth v. Low, Thacher Cr. Cas. (Mass.) 477. To sell and deliver an animal to one person, and then sell and deliver it to another, is larceny: Hooper v. State (Tex. Cr.), 25 S. W. 966.

b. By Force.—The taking is usually done secretly and stealthily, without the use of any force: See State v. Ledford, 67 N. C. 60. But some physical exertion is usually necessary to commit the crime of larceny: Brennon v. State, 25 Ind. 403. If violence is resorted to in order to take the property, the crime is robbery instead of larceny. The line is frequently very narrow which separates the two offenses. But to constitute robbery, it seems that the force used must be enough to constitute violence: Brennon v. State, 25 Ind. 403. And it is held that the snatching of property from the person of another without violence and without putting the owner in fear is larceny and not robbery: State v. Sommers, 12 Mo. App. 374; State v. Henderson, 66 N. C. 627; Boyd v. State (Tex. Cr.), 29 S. W. 157; State v. Watson, 7 S. C. 63. Snatching a shawl from the person, a watch from its fob, or money from the hand, are acts constituting larceny and not robbery, since the force used is not to overpower the person robbed, but only to get the property: State v. Sommers, 12 Mo. App. 374. But if the force used does any injury to the person, as in snatching an earring from a lady's ear, or in tearing her hair by snatching a pin attached thereto, this is robbery and not larceny: Brennon v. State, 25 Ind. 403. Under some statutes regulating the crime of larceny from the person, the

idea of force and violence is not excluded: Williams v. United States, 3 App. Cas. (D. C.) 335.

c. By Fear.—The taking of property by putting the owner in fear is usually robbery and not larceny: Long v. State, 12 Ga. 293; State v. Sommers, 12 Mo. App. 374. Yet there may be a putting in fear by the use of threats which will make the offense larceny: State v. Kallaher, 70 Conn. 398, 66 Am. St. Rep. 116, 39 Atl. 606. Especially under statutes defining the offense of larceny from the person, where the idea of force or putting in fear is not excluded: Williams v. United States, 3 App. Cas. (D. C.) 335.

d. Open or Secret.—It has been said that to constitute larceny the taking should be done secretly, this being another distinction between larceny and robbery. And it has been said that the taking should be so secret that the owner is left without knowledge of the taker: State v. Ledford, 67 N. C. 60. But the publicity of taking will not prevent the offense from being larceny: Newsom v. State, 107 Ala. 133, 18 South. 206. Secrecy is not an essential element of the offense: Higgs v. State, 113 Ala. 36, 21 South. 353. The secrecy or publicity of the acts done is in and of itself immaterial, for the taking may be done openly and yet the crime be larceny: Carl v. State, 125 Ala. 89, 28 South. 505; Newsom v. State, 107 Ala. 133, 18 South. 206; Talbert v. State, 121 Ala. 33, 25 South. 690. It was aptly pointed out in McMullen v. State, 53 Ala. 531, that if, because there is no secrecy in the taking and carrying away, larceny cannot be committed, "the bolder and more reckless the criminal, the greater his chances of escaping conviction." There is no presumption of law on the question of intent, even though the taking be done openly and publicly. If the manner of taking is adopted as a mere device to steal, it is none the less larceny: Talbert v. State, 121 Ala. 33, 25 South. 690.

The fact that property is taken openly may be evidence that the taker intended only a trespass, and had no intent to steal. This circumstance is important, therefore, on the question of intent. So it has been held that where property is taken otherwise than by robbery, openly in the presence of the owner and others, the taker being conscious of their presence, the publicity of the taking affords strong presumption that the intent to steal does not exist: Newsom v. State, 107 Ala. 133, 18 South. 206; Johnson v. State, 73 Ala. 523. The mere taking of personal property openly and in the presence of the owner, or of others, carries with it evidence that it is only a trespass: McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93; Littlejohn v. State, 59 Miss. 273; Stuart v. People, 73 Ill. 20. An open taking may show that there was no felonious intent: Buchanan v. State (Miss.), 5 South. 617. That the taking was done openly and in the presence of the owner is very material where the accused asserts a claim of right to the property. Indeed, in some cases it is said that the secrecy or publicity of the taking is only material when done under a claim of right: Carl v. State, 125 Ala. 89, 28

South. 505. And while perhaps this may be an exaggeration, as the above cases would seem to indicate, yet the rule is clear that the secrecy or publicity of the act is material in determining the good faith of the claim asserted to the property, and consequently in determining the criminality of the act: Carl v. State, 125 Ala. 89, 28 South. 505; Newsom v. State, 107 Ala. 133, 18 South. 206; Lawrence v. State, 11 Tex. App. 306; Seymore v. State, 12 Tex. App. 391. As was said by Chief Justice Bleckley of Georgia, the publicity of the taking is very powerful evidence of the good faith of the claim: Causey v. State, 79 Ga. 564, 11 Am. St. Rep. 447, 5 S. E. 121.

A taking with a felonious intent may be larceny, notwithstanding the publicity of the taking: State v. Fenn, 41 Conn. 590; Johnson v. Commonwealth, 24 Gratt. 555. But the felonious intent must exist: State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; Hall v. Commonwealth, 78 Va. 678.

An effort to conceal the property of another, or the taking of it secretly, is evidence of a felonious intent. The secrecy of the taking and the concealment are, therefore, important elements for a jury to consider in determining the intent with which the act was done: Long v. State, 11 Fla. 295; Dozier v. State (Ala.), 30 South. 396.

Money or other property taken openly in the presence of the owner by surprise or by means of a trick is larceny if it is taken with a felonious intent: State v. Zumbunson, 86 Mo. 111; State v. Fenn, 41 Conn. 590; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Vaughn v. Commonwealth, 10 Gratt. 758.

e. **Employing Innocent Third Person.**—The taking need not be done by the hands of the thief himself. It will be none the less larceny if he procures an innocent third person to take it: Cummins v. Commonwealth, 5 Ky. Law Rep. 200. Hence, where a person sells property to another as his own with the fraudulent intent of depriving the owner of the same, and the purchaser actually takes the property, larceny is committed by the supposed seller, since he used an innocent agent in consummating his purpose: Lane v. State, 41 Tex. Cr. Rep. 558, 55 S. W. 831. A mere sale of the property is not sufficient, however, for there must be an actual taking or a conversion of the stolen property in order to support a conviction: Madison v. State, 16 Tex. App. 435; Hardeman v. State, 12 Tex. App. 207. But if the innocent buyer actually takes them, the taking is the same as if done by the thief himself: Madison v. State, 16 Tex. App. 435; Doss v. State, 21 Tex. App. 505, 57 Am. Rep. 618, 2 S. W. 814. Thus, where an accused pointed out to an innocent third person a cow and a calf, falsely and fraudulently claiming that he owned them, and sold them to such person, who took them, there is such a taking as will constitute larceny: Doss v. State, 21 Tex. App. 505, 57 Am. Rep. 618, 2 S. W. 814. Of similar

effect is Dale v. State, 32 Tex. Cr. Rep. 78, 22 S. W. 49; State v. Hunt, 45 Iowa, 673.

f. Possession by Thief.—Generally, there must have been an actual taking possession of the property by the thief in order to constitute theft, and the offense is not complete until the possession of the owner is severed by the taking of actual possession by the accused: Molton v. State, 105 Ala. 18, 53 Am. St. Rep. 97, 16 South. 795; Thompson v. State, 94 Ala. 535, 33 Am. St. Rep. 145, 10 South. 520. In this last case it was said that "there must be such a caption that the accused acquires dominion over the property": See, also, Frazier v. State, 85 Ala. 17, 7 Am. St. Rep. 21, 4 South. 691; State v. Seagler, 1 Rich. 30, 42 Am. Dec. 404. Under the Texas code, actual, manual possession of the property is not essential, although the property must in some manner have come into the actual or constructive possession of the thief, or he cannot be said to have taken it: Harris v. State, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390; Minter v. State, 26 Tex. App. 217, 9 S. W. 561; Conner v. State, 24 Tex. App. 245, 6 S. W. 138. If the thief has the property under his actual dominion, with power to take it into his actual manual possession, this is a sufficient taking: Minter v. State, 26 Tex. App. 217, 9 S. W. 561; Harris v. State, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390. The mere wounding of an animal upon its range and the pursuit of it, without capturing it, and without in some way bringing it under the control and dominion of the party, is not sufficient to constitute a taking: Minter v. State, 26 Tex. App. 217, 9 S. W. 561. But where the animal is killed, and is under the control of the accused, the offense is complete, though he has not taken manual possession of the animal: Coombes v. State, 17 Tex. App. 258; Hall v. State, 41 Tex. 287. In other jurisdictions, however, it would seem to be necessary, after an animal is killed, that the accused, or some one for him, should actually take possession of it, the mere killing not being sufficient: State v. Seagler, 1 Rich. 30, 42 Am. Dec. 404; Molten v. State, 105 Ala. 18, 53 Am. St. Rep. 97, 16 South. 795; Cross v. State, 64 Ga. 443. Thus, in Alabama it is held that the killing of an animal is not a sufficient taking possession, although the accused was near enough to take possession and carry it away: Molton v. State, 105 Ala. 18, 53 Am. St. Rep. 97, 16 South. 795. Even in Texas, it seems that an animal might be killed and still remain in the possession of the owner, the accused having no power or opportunity to take it into his actual possession by reason of the proximity of the owner or for other reasons: See Coombes v. State, 17 Tex. App. 258. Shooting a cow and starting to skin it is a sufficient taking possession: Lundy v. State, 60 Ga. 143. Where one sells cotton by sample, this is not such a taking as will subject him to criminal liability. The fact that his selling by sample gives him constructive possession of the cotton for purposes of trade is not such a taking as will render him liable for theft: Johnson v. State, 34 Tex. Cr. Rep.

254, 30 S. W. 228. Taking shoes out of a box and concealing them is a sufficient taking and carrying away to constitute larceny: Nutzel v. State, 60 Ga. 264.

We have already seen that the taking possession by an innocent third person to whom the property is sold is a sufficient taking possession by the thief.

IV. Trespass.

a. General Possession of Owner.—It is essential, in order to constitute the crime of larceny, that there should be a trespass to the possession of the owner. Without this trespass there can be no theft: State v. Martin, 34 N. C. 157; Gadson v. State, 36 Tex. 350; Garner v. State, 36 Tex. 693; State v. Copeland, 86 N. C. 691; People v. McDonald, 43 N. Y. 61; State v. McCartey, 17 Minn. 76; Phelps v. People, 72 N. Y. 334; Hite v. State, 9 Yerg. 198; Pritchett v. State, 2 Sneed, 285, 62 Am. Dec. 468.

There must be a trespass in the original taking: State v. Braden, 2 Over. 68; unless the accused has the custody of the property, in which case the trespass may be committed while the goods are in his custody: See later treatment. But the owner need not have actual physical possession of the property. Constructive possession is all that is required: Hite v. State, 9 Yerg. 198; Bennett v. State, 32 Tex. Cr. Rep. 216, 22 S. W. 684; People v. McDonald, 43 N. Y. 61; People v. Phelps, 49 How. Pr. 437; affirmed in Phelps v. People, 72 N. Y. 334.

Thus an owner, having some promissory notes in a bag, which he placed on a hatrack with his hat while eating in a restaurant, has such possession of them that they may be stolen from him: Commonwealth v. Butts, 124 Mass. 449. A domestic animal is in the possession of its owner when it is on its accustomed range: Jones v. State, 3 Tex. App. 498; Huffman v. State, 28 Tex. App. 174, 12 S. W. 588; McGrew v. State, 31 Tex. Cr. Rep. 336, 20 S. W. 740. A thief need not take an animal from the owner's premises. It may be stolen though it has strayed therefrom: Burger v. State, 83 Ala. 36, 3 South. 319. Cattle turned out to range are still in the constructive possession of their owner, whether they are on or off the owner's range: Bennett v. State, 32 Tex. Cr. Rep. 216, 22 S. W. 684. A lessee or cropper who secretly appropriates the crop to his own use does not commit larceny, for the reason that he, and not the land owner, is in the actual possession of such crop, and there can be no trespass upon the lessor's possession: State v. Copeland, 86 N. C. 691; Bell v. State, 7 Tex. App. 25. But where the one who raises the crop is a mere laborer, a servant of the land owner, the possession is in the land owner, and if the laborer takes it with intent to steal, he commits the necessary trespass to make the offense larceny: State v. Sanders, 52 S. C. 580, 30 S. E. 616.

The possession and ownership need not be in the same person. If property is taken from the possession of an agent, it is a sufficient trespass upon the possession of the principal: Fore v. State, 5 Tex.

App. 251. The agent stands in the position of the owner in respect to the possession, the possession of the agent being deemed to be that of the principal; and this is true, although the owner has never had the actual possession of the property: People v. McDonald, 43 N. Y. 61. So, if property is in the custody of a servant, so that the constructive legal possession is in the master, a taking from the servant with the servant's consent might still be larceny, since the necessary trespass upon the possession of the owner exists: State v. McCartey, 17 Minn. 76. Where a draft has been sent to the state comptroller for the purpose of paying taxes, the state has such a property in it that a thief may steal it from the state: People v. Phelps, 42 How. Pr. 437; affirmed in Phelps v. People, 72 N. Y. 334. The state in such a case has at least constructive possession of the property. These questions will be more fully discussed under subsequent subheads. The possession of a slave is the possession of its master, so that a taking from the slave will be a trespass to the master's possession, and larceny: Hite v. State, 9 Yerg. 198. So is it larceny to steal property in collusion with an owner's slave: United States v. Walker, 1 Cranch C. C. 402, Fed. Cas. No. 16,632. A slave can give no consent by which another can acquire possession of his master's property: Hite v. State, 9 Yerg. 198.

b. **Trespass in Case of Lost Goods.**—In another connection we have treated the questions as to whether lost goods can be stolen, and the intent necessary to constitute larceny of such property. It might seem that if goods are in reality lost, there could be no trespass to the possession of the true owner. Certainly, in case of goods or property merely mislaid, but which are not in reality lost, the owner still has the constructive possession thereof, and a disturbance of this possession by a thief will constitute larceny. Hence, a watch left with a jeweler for repair is in the constructive possession of the owner, although it has been thrown upon the pavement by an explosion of gunpowder: Pritchett v. State, 2 Sneed, 285, 62 Am. Dec. 468. So, a purse left unintentionally in a barber-shop is still in the constructive possession of the owner and may be stolen by the barber: Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644. And a purse left inadvertently in any other place is still in the owner's possession constructively, and may be stolen: See Pyland v. State, 4 Sneed, 357, where the pocket-book was left at a livery-stable; and State v. McCann, 19 Mo. 249, where it was left in a store. Where a ring is picked up in a house by a servant, the ring belonging to her mistress to the knowledge of the servant, larceny is committed, for the ring is still in the owner's constructive possession: State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208.

If goods are actually lost, however, and not merely mislaid, the courts of Tennessee have taken the attitude that no larceny is possible in such a case, as there can be no trespass to the possession of the owner. And this rule prevails notwithstanding the finder

may in fact know who is the owner of the property: Porter v. State, Mart. & Y. 226. So far as we are aware, this view has not been adopted in any other jurisdiction. As will be seen when we come to speak of property which may be stolen, genuinely lost property is the subject of larceny under certain circumstances: See State v. Ferguson, 2 McMull. 502. And if such property can be stolen, it necessarily follows that the finder does commit trespass upon it, for without trespass there can be no larceny. Few of the cases make this point clear, however, the main inquiry being whether the finder knew who was the owner at the time he found the property. While the authorities neglect to discuss this point of trespass, it is obvious that a trespass is deemed to be committed, otherwise an essential element in the crime would be wanting. The question was considered in Tanner v. Commonwealth, 14 Gratt. 635, the court holding that where goods are actually lost by the owner, his property is not devested; and such property draws to it the constructive possession, so that when a finder appropriates the goods with felonious intent, he commits a trespass to the owner's possession, and is guilty of larceny.

If the owner of lost goods authorizes one to find them and deliver them to a certain person, such finder becomes a bailee of the lost property, and a subsequent appropriation of the property is not larceny, since there is no trespass: State v. England, 8 Jones, 399, 80 Am. Dec. 334.

In Tennessee, where it is held there can be no larceny of lost goods, it is said that this rule is only true of inanimate objects. And that, as applied to straying animals or runaway slaves, such property is still in the constructive possession of the owner, and a taking of it with a felonious intent will be larceny, since the necessary trespass exists: Morehead v. State, 9 Humph. 635; Cash v. State, 10 Humph, 111. And in People v. Kaatz, 3 Park. C. Rep. 129, it was held that the rule relating to lost goods whose owner is not known is not applicable to cattle that have strayed from the inclosure of their owner into the highway. Such cattle are still constructively in the possession of their owner, so that one necessarily commits a trespass by taking them. To the same effect are State v. Martin, 28 Mo. 530, and Lamb v. State, 40 Neb. 312, 58 N. W. 963.

c. Obtaining Possession of Property.

1. Possession Acquired Lawfully.—A felonious taking is essential to establish the crime of larceny. Hence, where the possession is lawful in the first instance, a refusal to deliver to the owner on demand will not be larceny: People v. Tangher, 102 Mich. 598, 61 N. W. 66. If the taking is originally lawful, there can be no conviction for theft, unless it was obtained by means of fraud or some false pretext, with the intent to appropriate the property, and the property has been appropriated: Hornbeck v. State, 10 Tex. App. 408. Strictly speaking, a possession is not acquired lawfully when

it is induced by fraud or false representations, or with the intent to steal it. So, if the possession of property, as distinguished from its custody, is lawfully obtained for a lawful purpose, there can usually be no larceny.

2. **Possession Obtained by Fraud or False Representation.**—Where one obtains possession of property by means of fraud or a trick, with a preconcerted design to steal the property, the taking is larceny, for the fraud vitiates the transaction, the owner is still deemed to retain a constructive possession of the property, and the conversion of it by the defendant is such a trespass to that possession as constitutes larceny: Crum v. State, 148 Ind. 401, 47 N. E. 833; Huber v. State, 57 Ind. 341, 26 Am. Rep. 57; Fleming v. State, 136 Ind. 149, 36 N. E. 154; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178; Hecox v. State, 105 Ga. 625, 31 S. E. 592; People v. Rae, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; People v. Montarial, 120 Cal. 691, 53 Pac. 355; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; People v. De Graaff, 127 Cal. 676, 60 Pac. 429; People v. Campbell, 127 Cal. 278, 59 Pac. 593; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Soltau v. Gerdau, 119 N. Y. 380, 16 Am. St. Rep. 843, 23 N. E. 864; People v. Sumner, 33 App. Div. 338, 53 N. Y. Supp. 817; affirmed in 161 N. Y. 652, 57 N. E. 1120; State v. Hall, 85 Mo. 669; Commonwealth v. Eichelberger, 119 Pa. St. 254, 4 Am. St. Rep. 642, 13 Atl. 422; Mitchell v. State, 92 Tenn. 668, 23 S. W. 68; People v. Camp, 56 Mich. 548, 23 N. W. 216; Frazier v. State, 85 Ala. 17, 7 Am. St. Rep. 21, 4 South. 691; Commonwealth v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858; Devore v. Territory, 2 Okla. 562, 37 Pac. 1092; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093. So, where one fraudulently obtains the possession of money, agreeing to return the amount or five times the amount in counterfeit money, and immediately appropriates it to his own use with the intent of stealing it, he is guilty of larceny: Crum v. State, 148 Ind. 401, 47 N. E. 833. Taking possession of bills with the supposed purpose of counting them, but really to fraudulently retain and appropriate them, is larceny: Hecox v. State, 105 Ga. 625, 31 S. E. 592. Inducing one to deposit money with a person for the purpose of getting it into his possession, with the intent to thereafter feloniously appropriate it, the act of appropriation, when accomplished, constitutes larceny: People v. Montarial, 120 Cal. 691, 53 Pac. 355. And the voluntary giving of a worthless note for the money is a mere trick to hide the defendant's real design in such a transaction: People v. Tomlinson, 102 Cal. 19, 36 Pac. 506. Fraudulently obtaining money from a wife under a promise to return it or pay it to others who would secure an appointment on the police force for her husband, but really with the intent to steal it, is larceny: People v. De Graaff, 127 Cal. 676, 60 Pac. 429. Where two confederates, under the cover of throwing dice, induce another to part temporarily with his money, with the intent of keeping it, the con-

version of it is larceny: Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123. One to whom personal property is delivered for a special purpose, but who intended when he procured such delivery to appropriate the property to his own use, is guilty of larceny: Soltau v. Gerdau, 119 N. Y. 380, 16 Am. St. Rep. 843, 23 N. E. 864. To obtain a deed of release under the pretense that it was for a temporary purpose only, and then putting it on record, is such a trick or artifice as amounts to a constructive taking, and is evidence of an original felonious intent: State v. Hall, 85 Mo. 669. Where one secures possession of a note he has given for sixteen hundred dollars, under the pretense of giving a new note for the same amount, but instead substitutes a note for only sixteen dollars, with the intent to defraud the bank, the offense is larceny: Commonwealth v. Eichelberger, 119 Pa. St. 254, 4 Am. St. Rep. 642, 13 Atl. 422. Getting possession of a man's horse from his son by fraudulent representation, with the intent of depriving the owner of it, is larceny: People v. Camp, 56 Mich. 548, 23 N. W. 216. To kill another's animal with the intent of stealing it, and then getting the owner's consent by means of fraud, is larceny: Frazier v. State, 85 Ala. 17, 7 Am. St. Rep. 21, 4 South. 691. Obtaining possession of street-cars through false pretenses, with the intent of appropriating them to the taker's own use, is larceny: People v. Lawrence, 70 Hun, 80, 23 N. Y. Supp. 1095. An attorney who obtains possession of a sum of money from his client upon the false representation that it was the amount necessary to be paid for certain land, which his client desired to buy, and who, after paying the real price, appropriated the balance, is guilty of larceny: Commonwealth v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858. A conspiracy between two persons to get money from another fraudulently on a check, with intent to steal it, is larceny: Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178. The securing of possession of property by fraud, apparently for a special purpose, but really with the intent to convert it to the taker's use, becomes larceny when it is converted: Devore v. Territory, 2 Okla. 562, 37 Pac. 1092; People v. Hughes, 91 Hun, 354, 36 N. Y. Supp. 493. Obtaining possession of a horse by fraudulently pretending that the taker desired to drive it to a certain place for a specified time, but in fact to go to a different and more distant place, becomes larceny if the taker subsequently converts the horse to his own use with a felonious intent: State v. Coombs, 55 Me. 477, 92 Am. Dec. 610. Compare In re Mutchler, 55 Kan. 164, 40 Pac. 283. Obtaining money under the pretense that it is to be bet on a race, and with the intent at the time to convert it to the bailee's own use, the race being a mere sham to aid this purpose, is larceny: Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093.

Some of the authorities, notably in New York, directly hold that where property is taken by means of some trick, device, artifice, fraud, or false pretense from the possession of the owner, it is not

necessary, even at common law, that it should be taken by a trespass, thus apparently dispensing with the trespass which is generally deemed essential to constitute larceny. The artifice, fraud, or false pretense is considered as being a substitute for the usual trespass: See People v. Hughes, 91 Hun, 354, 36 N. Y. Supp. 493; People v. Lawrence, 137 N. Y. 517, 33 N. E. 547; People v. Sumner, 33 App. Div. 338, 53 N. Y. Supp. 817; affirmed in 161 N. Y. 652, 57 N. E. 1120. Fraud supplies the place of trespass in the taking: People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121. In other cases it appears to be held that the wrongful taking or trespass may be constructive, as where the possession is obtained by a trick or fraud: Frazier v. State, 85 Ala. 17, 7 Am. St. Rep. 21, 4 South. 691. In Commonwealth v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858, delivery by fraud would appear to transfer nothing but the mere custody of the property, the legal possession still being in the owner, so that the necessary trespass was committed by a felonious conversion of the property. In State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, it was said that when property was obtained by fraud the taking or trespass was continuous, from the time possession was delivered up to the time of the fraudulent conversion. In Devore v. Territory, 2 Okla. 562, 37 Pac. 1092, it was said that if fraud is used in obtaining possession of property, it will be construed as a trespass. The authorities in general seem to hold that the fraud so vitiates the transaction that the owner is considered as still retaining a constructive possession of the property, and a conversion of it by the taker constitutes such a trespass to this possession as makes the offense larceny: See Crum v. State, 148 Ind. 401, 47 N. E. 833; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, and cases cited, Elliott v. Commonwealth, 12 Bush, 176; State v. Reese, 49 La. Ann. 1337, 22 South. 378; Defrese v. State, 3 Heisk. 53, 8 Am. Rep. 1. In Williams v. State, 34 Tex. 558, it was held that in cases of fraud, the trespass, which is necessary to complete the theft, is not the original act of taking possession of the property, for that was with the consent of the owner, but it is the act of taking the property from the special custody which has, by the consent of the owner, been intrusted to the thief. In whatever way the different courts may view the matter, the rule itself is clear that where one by a trick, fraud, or false pretenses obtains the mere possession of personal property with the fraudulent intent of appropriating it to his own use, the offense is larceny.

The Tennessee courts, which at first denied this rule on the ground that no trespass was committed (Felter v. State, 9 Yerg. 397), now hold with the recognized rule stated above, by virtue of a statute defining larceny: Coldwell v. State, 3 Baxt. 429.

3. **Where Title to Property Passes.**—The rule we have just been considering—namely, the theft of personal property where possession is obtained by fraud or false representation—applies only in cases where the owner intends to part with his possession only.

If the owner intends to part with his entire ownership in the property, instead of with his mere possession, the offense is not larceny, but is something else—either cheating or obtaining property by false pretenses, generally the latter. Hence, the rule is well established that when by means of fraud, conspiracy, or artifice, the possession of property is obtained with a felonious intent, and the title as well as the possession is parted with, the crime is not larceny, but that of obtaining property by false pretenses: See People v. Rae, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; People v. Campbell, 127 Cal. 278, 59 Pac. 593; People v. De Graaff, 127 Cal. 676, 60 Pac. 429; Haley v. State, 49 Ark. 147, 4 S. W. 746; Pease v. State, 94 Ga. 615, 21 S. E. 588; Welsh v. People, 17 Ill. 339; Stewart v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; Elliott v. Commonwealth, 12 Bush, 176; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Commonwealth v. Wilde, 5 Gray, 83, 66 Am. Dec. 350; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; People v. Lawrence, 137 N. Y. 517, 33 N. E. 547; Lewer v. Commonwealth, 15 Serg. & R. 93; Kellogg v. State, 26 Ohio St. 15; Collins v. State, 15 Lea, 68; Pitts v. State, 5 Tex. App. 122.

The fact that the owner intends to part with the title to the property and not merely with the possession, marks the distinction between larceny and false pretenses. The matter was clearly presented in People v. Tomlinson, 102 Cal. 19, 36 Pac. 506, where it was pointed out that while on the facts there is often a narrow margin between larceny, obtaining money by false pretenses, and embezzlement, yet as a matter of law, if one honestly receives goods upon trust, and afterward fraudulently converts them to his own use, he is guilty of embezzlement; if he obtains possession by fraud, and the owner intends to part with the title, the offense is obtaining goods under false pretenses; but if he obtains possession fraudulently, with the intent to convert the same to his own use, and the owner does not part with the title, the offense is larceny. The same distinction between these crimes has been repeatedly recognized: See People v. Campbell, 127 Cal. 278, 59 Pac. 593; People v. De Graaff, 127 Cal. 676, 60 Pac. 429; Haley v. State, 49 Ark. 147, 4 S. W. 746; Stewart v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; Elliott v. Commonwealth, 12 Bush, 176; State v. Reese, 49 La. Ann. 1337, 22 South. 378; People v. Sumner, 33 App. Div. 338, 53 N. Y. Supp. 817; affirmed in 161 N. Y. 652, 57 N. E. 1120; Soltau v. Gerdau, 119 N. Y. 380, 16 Am. St. Rep. 843, 23 N. E. 864; Commonwealth v. Eichelberger, 119 Pa. St. 254, 4 Am. St. Rep. 642, 13 Atl. 422. There is an absence of the necessary trespass in the taking, where the owner actually consents to part with his entire ownership; hence there can be no larceny: Haley v. State, 49 Ark. 147, 4 S. W. 746; Stewart v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; Elliott v. Commonwealth, 12 Bush, 176; State v. Reese, 49 La. Ann. 1337, 22 South. 378.

A sale of personal property induced by fraud, where the title is to remain in the seller until the property is paid for, is a case where the possession only is parted with by the owner and not the title, and if procured with the felonious intent of appropriating to the taker's own use, will, upon being converted, constitute larceny and not obtaining property under false pretenses: Martin v. Territory, 4 Okla. 105, 43 Pac. 1067; Housh v. People, 24 Colo. 262, 50 Pac. 1036; People v. Raschke, 73 Cal. 378, 15 Pac. 13.

4. **False Playing for Money.**—Where a person is fraudulently induced to play at cards when he has no chance to win, the game being resorted to as a mere trick to get possession of the money, it is larceny: Hall v. State, 6 Baxt. 522. So, where two conspirators plan a betting trick for the purpose of defrauding one of his money, the offense is deemed larceny: Defrese v. State, 3 Heisk. 53, 8 Am. Rep. 1. And where the conspirators so fraudulently conduct a game of monte as to give another no chance of winning, and he parts with his money through fraud and fear, it is larceny: United States v. Murphy, 4 McAr. 375, 48 Am. Rep. 754. It would seem, therefore, that where a person loses at a dishonest betting game, the game being pure bunco, not knowing it to be such, the person conducting the game is guilty of larceny: State v. Skilbrick, 25 Wash. 555, 66 Pac. 53; People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093.

In these cases the innocent bettor usually intends to part with his possession merely, and not with his title: Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2. In considering this question of parting with the ownership of property in a sham game of cards, Judge Campbell used this vigorous language in People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121: "There is some rather attenuated discrimination to be found in the books between such cheats as induce a person to give temporary custody of his property to another, who keeps or disposes of it, and those whereby he is induced to part with it out and out. We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious."

5. **Sale of Goods Through Fraud.**—We have already seen that if the owner of personal property parts with the title thereto, by means of fraud or false representations, the offense is not larceny, but false pretenses. This is undoubtedly the correct rule. Hence, if one purchases goods, and both the possession and title are given to him by reason of his fraudulent representations, his offense is not

larceny, but obtaining goods by false pretenses: Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; Ross v. People, 5 Hill, 294.

There are cases, however, where some sort of a sale is intended, and yet the ownership does not pass to the party who converts the property, and in these cases larceny is committed. Thus, in Collins v. Ralli, 20 Hun, 246, a cotton broker fraudulently represented that he was authorized to buy for certain cotton mills. The sale was made, and the broker got possession for the purpose of shipping the cotton. The possession of the broker was, therefore, temporary for a specific purpose, and having procured such possession fraudulently for the purpose of converting the property, he was guilty of larceny. People v. Jackson, 3 Park. C. Rep. 590, was a somewhat similar case, the defendant falsely representing that he had sold S.'s property to a certain company. The property was delivered to the company, and the defendant went there and told them the goods had been delivered by mistake, and through such misrepresentation secured possession of the property and converted it. The offense was held to be larceny. To the same effect is Harris v. State, 81 Ga. 758, 12 Am. St. Rep. 355, 7 S. E. 689. So, the taking of property to sell, and if not sold to be returned, does not transfer title until it is sold. Hence, if it was obtained feloniously, for the purpose of depriving the owner of it, larceny is committed: Weyman v. People, 4 Hun, 511. The purchase of goods C. O. D., and the giving of a worthless check for them on arrival is larceny, where the whole transaction was intentionally fraudulent: Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551. In Gardner v. State, 55 N. J. L. 17, 26 Atl. 30, goods were sent C. O. D. and upon a false plea to examine them, the buyer fraudulently removed them from the box they were in, returning the box filled with something else. The offense was held to be larceny. So, any delivery to a purchaser merely to examine will be larceny if they are feloniously converted by the purchaser: St. Valerie v. People, 64 Hun, 426. Where any seller parts with the possession of goods, expecting payment before a sale is completed, the taking and conversion of such goods with the felonious intent to deprive the owner thereof will be larceny: State v. Hall, 76 Iowa, 85, 14 Am. St. Rep. 204, 40 N. W. 107. In Felming v. State, 136 Ind. 149, 36 N. E. 154, property was obtained by the fraudulent use of a worthless bill, and the offense was held larceny, though the question as to whether title passed or not was not raised.

6. **False Personation.**—Obtaining possession of personal property by falsely pretending to be the owner of it is theft, if done with the felonious intent of depriving the owner thereof: Madden v. State, 1 Tex. App. 204; Commonwealth v. Collins, 12 Allen, 181; Commonwealth v. Lawless, 103 Mass. 425; People v. Campbell, 127 Cal. 278, 59 Pac. 593. So the inducing of a conditional sale by falsely representing who one is, is larceny: Martin v. Territory, 4 Okla. 105, 43 Pac. 1067. Fraudulently obtaining personal property

by false impersonation may be made larceny by statute: State v. White, 12 Wash. 417, 41 Pac. 182; State v. Smith, 9 Wash. 248, 37 Pac. 290. Under the earlier Indiana decisions, obtaining property by falsely personating another seems not to have been considered larceny: Williams v. State, 49 Ind. 367.

Fraudulent personation by means of which personal property is acquired will be larceny if the title to the property does not pass to the taker: People v. Campbell, 127 Cal. 278, 59 Pac. 593. This, however, appears to be in cases where the original title is in the one from whom possession is obtained. But where the title is in another, who is falsely personated, the possessor having no title which he can confer upon the fraudulent taker, such taker obtains no property in the goods, "not even the qualified property of a bailee but a mere felonious possession, which is the essence of the crime of larceny": Commonwealth v. Collins, 12 Allen, 181.

d. Possession and Custody.

1. Distinction Between.—In a previous note on "Embezzlement," in 87 American State Reports, we pointed out at some length that the courts recognize a well-defined distinction between the possession and custody of personal property, and that if one is in reality intrusted with the possession of such property, a fraudulent conversion thereof to his own use will constitute embezzlement and not larceny. While if one is intrusted merely with the custody of property, as, for example, a servant, the possession still remains in the owner, so that a fraudulent conversion will be larceny, there being the necessary trespass to the owner's possession to render the offense larceny. This distinction will be noticed more fully as we proceed. It is sufficient here to point out its existence, and its importance as relating to the law of larceny. This distinction was clearly noted in People v. Call, 1 Denio, 120, 43 Am. Dec. 655, the court saying it was "necessary carefully to discriminate between what constitutes, in law, a possession of property, and that which amounts only to its care and charge." And quoting the rule as stated by East, the court said: "It is a clear maxim of the common law, that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use." Hence, in this case it was held that the maker of a note is guilty of larceny in feloniously appropriating it to his own use, where it is handed to him by the holder to indorse a payment, since he is intrusted with the mere custody of the note, the possession still remaining in the holder: See, further, as recognizing this distinction between custody and possession, Holbrook v. State, 107 Ala. 154, 54 Am. St. Rep. 65, 18 South. 109; People v. Phelps, 49 How. Pr. 437; State v. McCartey, 17 Minn. 76; Gill v. Bright, 6 T. B. Mon. 130, and the cases subsequently cited.

2. **Possession of Bailee.**—As a general rule, a bailment passes the possession of the property to the bailee, as distinct from the mere custody, and hence a bailee could not be guilty of larceny, since he came lawfully into the possession of the property, and, therefore, failed to commit the trespass necessary to render the offense larceny. This was the rule at common law, and except where modified by statute so as to make bailees generally guilty of larceny, it is still the rule: See Wright v. Lindsay, 20 Ala. 428; Case v. State, 26 Ala. 17; Spivey v. State, 26 Ala. 90; Johnson v. People, 113 Ill. 99; Warmoth v. Commonwealth, 81 Ky. 133; Commonwealth v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560, 30 N. E. 364; Commonwealth v. King, 9 Cush. 284; People v. Cruger, 102 N. Y. 510, 55 Am. Rep. 830; State v. England, 8 Jones, 399, 80 Am. Dec. 334; Stokely v. State, 24 Tex. App. 509; Hill v. State, 57 Wis. 377, 15 N. W. 445; Krause v. Commonwealth, 93 Pa. St. 418, 39 Am. Rep. 762; People v. Call, 1 Denio, 120, 43 Am. Dec. 655; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Robinson v. State, 1 Cold. 120, 78 Am. Dec. 487; Gill v. Bright, 6 T. B. Mon. 130; Richards v. Commonwealth, 13 Gratt. 803; Holbrook v. State, 107 Ala. 154, 54 Am. St. Rep. 65, 18 South. 109. Thus, a factor does not usually commit larceny by converting the property to his own use: Snell v. State, 50 Ga. 219; since he has lawful possession of the property. Under the common-law definition, "every larceny necessarily includes a trespass," said the court in Johnson v. People, 113 Ill. 99; "for a trespass to personal property is nothing more than the unlawful and forcible taking of the goods of another without such felonious intent; and as a trespass is an injury to the possession only, it logically and legally follows that no one in the lawful possession of goods can commit a larceny of them, for it were idle and absurd to talk of one committing an injury to his own possession—and such is the well-settled doctrine of the common law." Hence this case holds that where the owner of a chattel delivers it to one in trust, upon a contract, express or implied, that the latter will faithfully execute the trust, which is an ordinary bailment, the possession as well as the custody of the chattel passes to the bailee with its delivery, and while the contract of bailment exists, the bailee cannot commit a larceny of the chattel. Where one intrusts personal property to another to procure a loan on it, and the latter procures the loan but appropriates the proceeds, this is not larceny of the property pledged: People v. Cruger, 102 N. Y. 510, 55 Am. Rep. 830. Rightfully getting possession of a horse to ride to a certain place, and converting it to the taker's own use by swapping it before reaching such place, is not larceny: Stokely v. State, 24 Tex. App. 509, 6 S. W. 538. If one hires a horse and sells it before the journey is performed, or afterward before the horse is returned, the bailee does not commit larceny in the absence of a felonious intent at the time of taking it: Hill v. State, 57 Wis. 377, 15 N. W. 445; for a bona fide hiring with a real intention of returning is not

rendered larceny by a subsequent conversion. So, a conditional bona fide sale of horses, followed by a conversion with fraudulent intent, is not larceny, the possession being lawful: Krause v. Commonwealth, 93 Pa. St. 418, 39 Am. Rep. 762. If the original intention is honest and fair, and the contract bona fide, no subsequent changing of that design will make the contract larceny: Commonwealth v. Smith, 1 Clark (Pa.), 400.

Goods on the premises of an owner, to be used by himself, his family, and his servants, are always considered in the possession of the owner, and one using them having their mere custody may commit larceny: Johnson v. People, 113 Ill. 99; People v. Call, 1 Denio, 120, 43 Am. Dec. 655; Gill v. Bright, 6 T. B. Mon. 130. Chairs, beds, tableware, and other articles used by a guest in a hotel or private house are in his custody only, the possession being in the landlord or host, and hence if converted, the trespass necessary to constitute larceny is committed: Johnson v. People, 113 Ill. 99; Richards v. Commonwealth, 13 Gratt. 803. A butler may commit larceny of plate in his custody, and a shepherd of sheep: People v. Call, 1 Denio, 120, 43 Am. Dec. 655. Although one has acquired lawful possession by a valid contract of bailment, if the contract is afterward terminated by some tortious act of the bailee, whereby the possession reverts to the owner, leaving the custody merely with the former, a felonious conversion to his own use will be larceny: Johnson v. People, 113 Ill. 99; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590. The usual cases in which such a rule has been applied are cases of common carriers or ordinary bailees, to whom a package has been intrusted for delivery, and the carrier breaks the package and converts to his own use either a part or the whole of its contents. So, also, one to whom a letter containing money has been intrusted to mail, and the letter is broken open and the money converted, it is larceny: See Johnson v. People, 113 Ill. 99; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Robinson v. State, 1 Cold. 120, 78 Am. Dec. 487. The doctrine of these cases is that by breaking the package and abstracting the contents, the contract of bailment is determined, and the former bailee stands in no better position in respect to the possession than a servant having the mere charge or custody of the goods. Bonds deposited in a bank and locked in a drawer, the owner having the key thereto, may be stolen by the cashier who breaks into the box and fraudulently appropriates them: Truslow v. State, 95 Tenn. 189, 31 S. W. 987. In Louisiana, a depositary who sells the deposit commits a theft: McGregor v. Ball, 4 La. Ann. 289. In common-law states the question would turn upon the character of the depositary's possession. One, in whose possession a trunk has been left, who opens the trunk and feloniously appropriates money found therein, commits larceny: Robinson v. State, 1 Cold. 120, 78 Am. Dec. 487. A person staying at a hotel, to whom a gun is given to go hunting, is guilty of larceny if he takes and disposes of the gun with felonious

intent: Richards v. Commonwealth, 13 Gratt. 803. A miller who receives barilla to grind and fraudulently retains part of it is guilty of larceny, the bailment being terminated by separating a part from the whole: Commonwealth v. James, 1 Pick. 375. Where one got staves upon the land of another upon a contract to have half of them, he may commit larceny of them, since he has the mere custody of them, not being a bailee or a joint owner: State v. Jones, 19 N. C. 544. One having the bare custody of goods to deliver may commit theft of them: Holbrook v. State, 107 Ala. 154, 54 Am. St. Rep. 65, 18 South. 109. Goods delivered to a workman for a special purpose is guilty of larceny if he afterward takes them away with intent to steal: United States v. Strong, 2 Cranch C. C. 251, Fed. Cas. No. 16,411.

We have already seen that a bailee who fraudulently obtains possession of personal property with the intent to steal it is guilty of larceny if he afterward appropriates the property. The fraud vitiates the lawful character of the taker's possession, he getting the mere custody of the property, as some cases hold, or the fraud supplying the place of trespass in the taking, as appears to be the reasoning of other cases: See, further, People v. Smith, 23 Cal. 280; People v. Abbott, 53 Cal. 284, 31 Am. Rep. 59; People v. Martin, 116 Mich. 446, 74 N. W. 653; Johnson v. People, 113 Ill. 99.

3. **Changing Money.**—The delivery of money to another for the sole purpose of getting it changed is a parting with the custody only, and not the possession, so that a conversion of it will be larceny: Murphy v. People, 104 Ill. 528; People v. Rae, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; Commonwealth v. Barry, 124 Mass. 325; Commonwealth v. Flynn, 167 Mass. 460, 57 Am. St. Rep. 472, 45 N. E. 924; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; Justices v. Henderson, 90 N. Y. 12, 43 Am. Rep. 135; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; Finkelstein v. State, 105 Ga. 617, 31 S. E. 589. A distinction seems to have been drawn in certain English cases between the delivery of money to be changed in the presence of the owner, and the delivery of money to be taken away and changed. The first case is larceny, the second not. In the first case the delivery of the money and the giving of the change were to be simultaneous acts, and until the change was paid the delivery was not complete, neither the possession nor property passing, but the money remained in legal contemplation under the control and in the possession of the owner: See Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435. There is some intimation in this case that where the person goes out to get change, entire possession of the money is parted with and the owner never intended to have it back. But later New York cases refuse to recognize any such distinction as has been drawn in England, and in Justices v. Henderson, 90 N. Y. 12, 43 Am. Rep. 135, such a distinction was expressly repudiated. And decisions elsewhere are to the same effect: Commonwealth v. Barry, 124 Mass. 325; Commonwealth v. Flynn,

167 Mass. 460, 57 Am. St. Rep. 472, 45 N. E. 924. In delivering money to be changed, the possession is parted with only on condition that the owner is to receive the change for it: Levy v. State, 79 Ala. 259.

Similar to the above cases are those in which one delivers to another property by mistake, particularly a larger sum of money than he intended. In such a situation, if the taker receives the excessive amount with knowledge of the mistake and with the intent to appropriate it to his own use, he commits larceny: State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; Bailey v. State, 58 Ala. 414; State v. Williamson, Houst. C. C. 155; Cooper v. Commonwealth, 22 Ky. Law Rep. 1627, 60 S. W. 938; Wolfstein v. People, 6 Hun, 121; Fulcher v. State, 32 Tex. Cr. Rep. 621, 25 S. W. 625; People v. Miller, 4 Utah, 410, 11 Pac. 514; Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291. In such cases as these there is no real bailment of the money, there being no consent of the owner to part with more than the correct amount: Fulcher v. State, 32 Tex. Cr. Rep. 621, 25 S. W. 625; State v. Ducker, 8 Or. 394, 34 Am. Rep. 590.

4. Carriers of Goods.—The rule is universally recognized that a carrier to whom the possession of goods is delivered cannot commit larceny by converting such goods to his own use: State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Johnson v. People, 113 Ill. 99; Nichols v. People, 17 N. Y. 114. The reason is that the carrier, as a bailee, has obtained lawful possession of the goods, and hence cannot commit the necessary trespass to render the offense larceny. If, however, the carrier breaks the package in which the goods are delivered to him, and takes away and converts a part only of the goods, this is larceny: State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Johnson v. People, 113 Ill. 99; Nichols v. People, 17 N. Y. 114. And if several packages are delivered to a carrier, a conversion of one of them will be a sufficient breaking to constitute larceny: Commonwealth v. Brown, 4 Mass. 580. And if after the package is broken the carrier converts all of the goods, it is larceny: State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590.

The most frequent and prevailing principle upon which this distinction is placed is that the act of breaking the package is an act of trespass on the part of the carrier which terminates the contract of bailment, and the carrier then stands in no better position than any other mere custodian of goods: State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Nichols v. People, 17 N. Y. 114.

A servant of a common carrier who steals goods cannot claim the exemption to which a carrier is entitled—namely, that he must break the package in which the goods are delivered to the carrier or he cannot be convicted of larceny: Commonwealth v. Brown, 4 Mass. 580. Hence it is held that a brakeman on a train is a mere servant of the carrier, has no possession of the goods being carried

on the train, and so may commit larceny of them: Brown v. People, 20 Colo. 161, 36 Pac. 1040; Manson v. State, 24 Ohio St. 590.

If the owner of goods, by mistake or accident, leaves them in a coach, the carrier commits larceny by feloniously converting them to his own use: United States v. Negro Pearl, 5 Cranch C. C. 392, Fed. Cas. No. 16,022.

5. **Hiring or Borrowing Property.**—We have already pointed out under "bailees" that one who honestly hires a horse for a particular purpose, lawfully acquiring possession, does not usually commit larceny by subsequently converting such property to his own use: Stokely v. State, 24 Tex. App. 509, 6 S. W. 538. And it is not larceny if one hires a team under the pretense of going to one place, and intends going to another and more distant place, where he has no intention of converting the property, and notifies the owner that his team awaits him at the more distant place: In re Mutchler, 55 Kan. 164, 40 Pac. 283. But see State v. Coombs, 55 Me. 477, 92 Am. Dec. 610. But the hiring of property under a false pretext, with the intention of stealing it, is larceny if the property is converted to the taker's use: Berg v. State, 2 Tex. App. 148; State v. Lindenthall, 5 Rich. 337, 57 Am. Dec. 743; State v. Woodruff, 47 Kan. 151, 27 Am. St. Rep. 285, 27 Pac. 842. And the crime would seem to be complete as soon as the property is received: Commonwealth v. Smith, 1 Clark (Pa.), 400. It is not necessary that the taker sell or otherwise dispose of the property: State v. Humphrey, 32 Vt. 569, 78 Am. Dec. 605. Under the Texas statute, it seems that some act of appropriation, otherwise than the taking, must be shown: Berg v. State, 2 Tex. App. 148. The facts of this case do not show it to be in conflict with the rule elsewhere. One who, under a pretense of hiring a mule, gets possession of it and trades it off for a horse, falsely representing to the owner that it had escaped, is guilty of larceny: Smith v. State, 35 Tex. 738.

In Tennessee, it has been held that to procure from the owner a horse, by fraud, under the pretense of hiring, but with the felonious intent of converting to his own use, is not larceny, there being no trespass in the taking: Felter v. State, 9 Yerg. 397. This rule has since been changed by statute: Coldwell v. State, 3 Baxt. 429.

As in hiring, so the borrowing of a chattel with the intention of fraudulently converting it to one's own use, and afterward so converting it, is larceny: White v. State, 11 Tex. 769; Starkie v. Commonwealth, 7 Leigh, 752.

6. **Possession by Servants or Agents.**—It has been established from the earliest times that the possession by a servant of the goods of the master is possession of the master himself, and that the servant has the mere charge or custody of them. Having, therefore, the mere custody of them, he is guilty of larceny if he feloniously converts them to his own use, because he thereby commits the trespass necessary to constitute the offense, the legal possession still being in the owner: See Holbrook v. State, 107 Ala. 154.

54 Am. St. Rep. 65, 18 South. 109; Case v. State, 26 Ala. 17; Crocheron v. State, 86 Ala. 64, 11 Am. St. Rep. 18, 5 South. 649; Powell v. State, 34 Ark. 693; People v. Belden, 37 Cal. 51; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Brown v. People, 20 Colo. 161, 36 Pac. 1040; Marcus v. State, 26 Ind. 101; People v. Garcia, 25 Cal. 531; People v. Perini, 94 Cal. 573, 29 Pac. 1027; Commonwealth v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Commonwealth v. Hays, 14 Gray, 62, 74 Am. Dec. 662; State v. McCartey, 17 Minn. 76; State v. Farmer, 46 N. H. 200; People v. Call, 1 Denio, 120, 43 Am. Dec. 655; Warmoth v. Commonwealth, 81 Ky. 133; Phelps v. People, 72 N. Y. 334; People v. McDonald, 43 N. Y. 61; State v. Jarvis, 63 N. C. 556; Manson v. State, 24 Ohio St. 590; Crook v. State, 39 Tex. Cr. Rep. 252, 45 S. W. 720; Livingston v. State, 38 Tex. Cr. Rep. 535, 43 S. W. 1008; State v. Schingen, 20 Wis. 74; State v. Self, 1 Bay, 242; Jenkins v. State, 62 Wis. 49, 21 N. W. 232.

A servant has the bare custody of goods, as distinguished from the possession, the legal possession being in the master: Oxford v. State, 33 Ala. 416; Crocheron v. State, 86 Ala. 64, 11 Am. St. Rep. 18, 5 South. 649. Thus, a clerk in a store, who has the possession of his employer's goods for the purpose of selling them in the usual course of business, commits larceny by feloniously removing them from the store: Marcus v. State, 26 Ind. 101; Walker v. Commonwealth, 8 Leigh, 743. But see Case v. State, 26 Ala. 17. The mere fact that an employé has access at times to the safe where the employer deposited his money does not devest the employer of its possession. The possession is still in the employer, and a taking of it by the employé is larceny: Turner v. State, 124 Ala. 59, 27 South. 272. An assistant foreman of a warehouse, who has only authority to deliver property stored, upon proper orders, is guilty of larceny in selling any of the property: People v. Perini, 94 Cal. 573, 29 Pac. 1027. A railway conductor who takes up tickets, does not cancel them, and converts them to his own use, intending to do so when he took up the tickets, is guilty of larceny: State v. Farmer, 46 N. H. 200. An employé in a barber-shop may commit larceny of the implements and furniture used there: Livingston v. State, 38 Tex. Cr. Rep. 535, 43 S. W. 1008. A servant who takes his master's horse from the stable or pasture has the mere custody of it, and is guilty of larceny if he appropriates to his own use: People v. Wood, 2 Park. C. Rep. 22; Crook v. State, 39 Tex. Cr. Rep. 252, 45 S. W. 720; People v. Belden, 37 Cal. 51. The same rule was held to apply to a hostler in State v. Self, 1 Bay, 242. The agent of an express company may commit larceny of money lying in the company's safe waiting to be delivered to the consignee: Jenkins v. State, 62 Wis. 49, 21 N. W. 282. A person employed to haul and deliver coal, who has no other possession of the coal than that necessary in delivering it, is guilty of larceny if he feloniously converts it to his own use: Washington v. State, 106 Ala. 58, 17 South. 546.

The trespass essential to make the taking by a servant larceny occurs when he changes the mere custody of his master's goods into an adverse possession in himself with a felonious intent. This is the doctrine of all the cases: See, especially, Powell v. State, 34 Ark. 693. And an offer by a servant to sell his master's property in his custody is sufficient proof of a conversion, without any actual sale: State v. Schingen, 20 Wis. 74.

A distinction is drawn in some of the cases between the possession of a servant and that of an agent, An agent being considered a bailee who obtains actual possession of the goods, as distinguished from the mere custody of an ordinary servant. In Case v. State, 26 Ala. 17, it was said that this distinction had not been very clearly drawn by the books, yet very important results might depend upon it. And it is doubtless true that there may frequently be cases of agency where the agent has the real possession of goods, while an ordinary servant will have nothing but the bare custody thereof. Thus, it has been held that the clerk of a tax collector comes into the lawful possession of money paid as taxes, and could not commit larceny of it: Snapp v. Commonwealth, 82 Ky. 173. An agent who acquires possession of a horse to use in driving around the country comes into rightful possession, unless obtained through fraud, and does not commit larceny by appropriating it: Rumbo v. State, 28 Tex. App. 30, 11 S. W. 680.

Statute may, however, establish an entirely different rule and wipe out all distinction between agents and servants, and provide that whenever one delivers property to an agent or servant, the latter comes into the rightful possession thereof, so that he cannot commit the trespass necessary to make the offense larceny, and the crime must, therefore, be embezzlement: See Ennis v. State, 3 G. Greene, 67; State v. Wingo, 89 Ind. 204. This last case frankly admits that the possession of a servant is the possession of the master, and in the absence of a statute on the subject, a felonious appropriation by a servant of his master's property would be larceny. Conversely, a statute may provide that the felonious appropriation of any property in the possession of an agent is larceny: People v. Civille, 44 Hun, 497. And the offense will be larceny in such case, although the agent is entitled to commissions out of the property which has been consigned to him for sale: Brandenstein v. Way, 17 Wash. 293, 49 Pac. 511.

Still another distinction is recognized in the case of servants, relative to the character of their possession, and that is, where property is delivered to a servant by a third person, to be delivered to his master. In such a case it is usually held that the property has never yet been in the possession of the master, hence the servant's possession is not that of his master, but he is a bailee, and a conversion of the goods by him is not larceny, provided he converts them before they have reached their destination, and something more has happened to reduce the servant to a mere custodian:

Commonwealth v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560; Commonwealth v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858; Commonwealth v. King, 9 Cush. 284; Phelps v. People, 72 N. Y. 334; People v. McDonald, 43 N. Y. 61; Holbrook v. State, 107 Ala. 154, 54 Am. St. Rep. 65, 18 South. 109; Warmoth v. Commonwealth, 81 Ky. 133. In such a case as we have stated, the goods are neither in the actual or the constructive possession of the owner: Commonwealth v. King, 9 Cush. 284. This rule is sometimes spoken of as the ultimate destination rule, and the property must reach its ultimate destination—that is, the possession of the master—before the servant can commit a theft of it: Phelps v. People, 72 N. Y. 334; People v. McDonald, 43 N. Y. 61. It must be clear that the property has been delivered to the master, or deposited in some place over which the master has control, so that it can be considered at least in the constructive possession of the master: See Warmoth v. Commonwealth, 81 Ky. 133. Ordinarily, the deposit of money in the till of a shop will be a sufficient delivery into the master's possession: Commonwealth v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560, 30 N. E. 364. But this same case holds that the mere physical presence of money in the till for a moment is not conclusive while the servant is on the spot and has not lost his power over it. So, if he receives money and drops it into the drawer of a cash register, having an intent to appropriate it, and slips it into the drawer merely for his own convenience in keeping it for himself, his subsequent taking it out of the drawer and appropriating it to his own use is not larceny, but embezzlement: Commonwealth v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560, 30 N. E. 364. The New York cases point out still another distinction, that when a servant receives property from another, who occupies the relation of agent for the owner, or who stands in the position of the owner in respect to the possession, then, though the owner never had the possession, yet the possession of such other person is the owner's possession, so that felonious appropriation of the property by the servant will be larceny: Phelps v. People, 72 N. Y. 334; People v. McDonald, 43 N. Y. 61.

7. **Effect of Statutes.**—We have just noticed that the rule applying to servants and agents may be changed by statute so that they may be guilty of embezzlement and not larceny, or that a real agent may be guilty of larceny and not embezzlement.

So, in reference to any bailee of property, statute may provide that such a person is guilty of larceny, if he feloniously converts the property intrusted to him, regardless of the character of his possession, and though he may have the real possession of the property, as distinguished from its custody: See People v. Poggi, 19 Cal. 600; Johnson v. People, 113 Ill. 99; Davis v. State, 54 Neb. 177, 74 N. W. 599; Truslow v. State, 95 Tenn. 189, 31 S. W. 987. The offense in such cases is statutory, and not common-law, lar-

ceny: Johnson v. People, 113 Ill. 99. A pledgee may by statute commit larceny of the property intrusted to him: Mais v. State, 36 Tex. Cr. Rep. 448, 34 S. W. 267, 37 S. W. 748. Ordinarily, one who hires a horse for use cannot commit larceny of it, since his possession is without the necessary trespass, but by statute such bailee may be guilty of fraudulent conversion of the property: Mangum v. State, 38 Tex. Cr. Rep. 231, 42 S. W. 291.

Under the statutes of some of the states, larceny and embezzlement are almost the same, to the extent, at least, that proof of embezzlement will sustain an indictment for larceny: See Pitsnogle v. Commonwealth, 91 Va. 808, 50 Am. St. Rep. 867, 22 S. E. 351.

V. Asportation.

An asportation or carrying away of the property stolen is as essential as any other element in order to constitute the offense: Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Jackson, 65 N. C. 305; Gettinger v. State, 13 Neb. 308, 14 N. W. 403; State v. Higgins, 88 Mo. 354; State v. Green, 81 N. C. 560; Eckels v. State, 20 Ohio St. 508; Harris v. State, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Flynn v. State, 42 Tex. 301; Commonwealth v. Luckis, 99 Mass. 431, 96 Am. Dec. 769; State v. Gazell, 30 Mo. 92; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67; Croom v. State, 71 Ala. 14; Scott v. Harbor, 18 Cal. 704; People v. Murphy, 47 Cal. 103; Williams v. State, 63 Miss. 58; State v. Gilbert, 68 Vt. 188, 34 Atl. 697; State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216; State v. Craige, 89 N. C. 475, 45 Am. Rep. 698; unless the necessity of proving a carrying away is dispensed with by statute, as appears to be the case in Texas, where it is held that neither asportation nor actual manual possession of the property is essential to constitute theft: Harris v. State, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390; Doss v. State, 21 Tex. App. 505, 57 Am. Rep. 618, 2 S. W. 814. This rule appears to have no support elsewhere, the universal rule in other jurisdictions being, as stated, that a carrying away is one of the essential elements in the offense. But a temporary possession by the thief, though it be but for an instant, is sufficient: Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Jackson, 65 N. C. 305. The very least removal of the property from the place where it is found by the thief is all that is required: Gettinger v. State, 13 Neb. 308, 14 N. W. 403. It need not be taken out of the room where it is found: State v. Higgins, 88 Mo. 354. The removal of a drawer from a safe and a handling of the money in the drawer is a sufficient asportation: State v. Green, 81 N. C. 560. If the thief actually takes hold of money in the drawer and lifts it from the place where the owner had put it, so as to entirely sever it from the spot where it was so placed, and thus give the thief for an instant the entire possession of the property, this is all that is required: Eckels v. State, 20 Ohio St.

508; Harris v. State, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390. Lifting a pocket-book partly from the pocket of another, although it is not removed, is a taking and carrying away: State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Flynn v. State, 42 Tex. 301. But where the thief's hand is seized by the owner of the purse as soon as it is thrust into his pocket, so that the thief never obtained full custody and control of the purse, there is no sufficient asportation to constitute larceny: Commonwealth v. Luckis, 99 Mass. 431, 96 Am. Dec. 769. The asportation is complete if a person takes and leads a horse a short distance, though it is not removed from the inclosure where it is found: State v. Gazell, 30 Mo. 92. But enticing a hog for twenty yards on the owner's premises by dropping corn, and then abandoning it, was held not sufficient in Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67. The marking of hogs with the felonious intent of claiming them as one's own is sufficient asportation: Scott v. Harbor, 18 Cal. 704. So, also, in shooting and killing a hog, and then taking hold of it and cutting its throat: Croom v. State, 71 Ala. 14; Kemp v. State, 89 Ala. 52, 7 South. 413. But the contrary was held in Williams v. State, 63 Miss. 58, where no further act of taking or carrying away was done after the hog's throat was cut. The mere killing of a domestic animal, without any felonious intent and without making any attempt to remove it, is nothing more than malicious mischief; People v. Murphy, 47 Cal. 103. The removing of a steer a short distance while alive, to get it where it could be killed and carried away, is sufficient asportation to establish larceny of such animal: State v. Gilbert, 68 Vt. 188, 34 Atl. 697. So is the driving of cattle six hundred yards and then killing them: Wilburn v. Territory (N. Mex.), 62 Pac. 968. Goods taken out of the place where they were put, though the taker is detected before they are actually carried away, are asported so as to render the taker guilty of larceny: State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216. Removing wheat from the owner's garner in a mill to the defendant's adjoining garner is a sufficient asportation: State v. Craige, 89 N. C. 475, 45 Am. Rep. 698. So is taking wheat and putting it in sacks: State v. Hecox, 83 Mo. 531. And removing property from a store to the sidewalk: State v. Mitchener, 98 N. C. 689, 4 S. E. 26. In the larceny of timber under a statute, the cutting and carrying away need not be one continuous act done at the same time: Carl v. State, 125 Ala. 89, 28 South. 505.

The turning over of a barrel of turpentine is not a sufficient asportation: State v. Jones, 65 N. C. 395. If an attempt to carry away is frustrated by reason of the fact that the property is fastened to the premises of the owner, this is not a sufficient asportation to constitute larceny. So held where a person attempted to steal an overcoat from a dummy standing outside of a store, which attempt was frustrated by the fact that the coat was chained to the dummy: People v. Meyer, 75 Cal. 383, 17 Pac. 431.

VI. Personal Property.

a. **In General.**—Generally speaking, any personal property which is recognized by the law as property may be the subject of larceny. The cases already cited illustrate many kinds of personal property which may be stolen. Among other personal property which is the subject of theft may be cited the following: Grain: State v. Craige, 89 N. C. 475, 45 Am. Rep. 698; State v. Hecox, 83 Mo. 531; barilla: Commonwealth v. James, 1 Pick. 375; ice put away in an ice-house for domestic use: Ward v. People, 3 Hill, 395; a box of matches, placed by the owner of a store on his counter for the use of his customers and the public, in lighting cigars and pipes: Mitchum v. State, 45 Ala. 29; liquor kept in violation of law: Commonwealth v. Coffee, 9 Gray, 139; State v. May, 20 Iowa, 305; postage stamps belonging to the United States, not yet issued or sold: Jolly v. United States, 170 U. S. 402, 18 Sup. Ct. Rep. 624; illuminating gas: Commonwealth v. Shaw, 4 Allen, 308, 81 Am. Dec. 706; State v. Wellman, 34 Minn. 221, 25 N. W. 395; deer skins in an Indian camp, whether the Indians were trespassers or not: Pennsylvania v. Becomb, Add. 386; money: People v. Williams, 24 Mich. 156, 9 Am. Rep. 119; although the money may have been acquired by the illegal sale of intoxicating liquors: Commonwealth v. Rourke, 10 Cush. 397; and United States currency which is the subject of larceny includes gold or silver money, treasury notes, or bank notes: Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South. 659; foreign and domestic coin: United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827; money taken from the land of another is not included in "any kind of property whatsoever growing or being upon" such land: State v. Vosburg, 111 N. C. 718, 16 S. E. 392.

Choses in action were not the subject of larceny at common law: Culp v. State, 1 Port. 33, 26 Am. Dec. 357; United States v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930; United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827. This applied to private promissory notes always: United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827. And to bank notes as well: Culp v. State, 1 Port. 33, 26 Am. Dec. 357; United States v. Bowen, 2 Cranch C. C. 133, Fed. Cas. No. 14,628; United States v. Carnot, 2 Cranch C. C. 469, Fed. Cas. No. 14,726. These last two cases hold that bank notes are not goods and chattels, or money, at common law. Justice Story, however, in an early case distinguished between private promissory notes, which are merely evidence of a debt, and bank notes, which have a present value as currency, and held that bank notes were personal goods, and hence subject to larceny: United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827. And bank notes are now almost universally deemed to be goods and chattels or personal property, the subject of larceny: Corbett v. State, 31 Ala. 329; Thomasson v. State, 22 Ga. 499; State v. Bond, 8 Iowa, 540; Commonwealth v. Rand, 7 Met. 475, 41 Am. Dec. 455; McDonald v. State, 8 Mo. 283; Starkey v. State, 6 Ohio St. 266; State v.

Tillery, 1 Nott & McC. 9; State v. Casados, 1 Nott & McC. 91; Pyland v. State, 4 Sneed, 357; Boyd v. Commonwealth, 1 Rob. (Va.) 691; Cummings v. Commonwealth, 2 Va. Cas. 128; Pomeroy v. Commonwealth, 2 Va. Cas. 342; Sallie v. State, 39 Ala. 691; Sansbury v. State, 4 Tex. App. 99; Collins v. People, 39 Ill. 233; Garfield v. State, 74 Ind. 60; Damewood v. State, 1 How. (Miss.) 262; Greeson v. State, 5 How. (Miss.) 33. In Culp v. State, 1 Port. 33, 26 Am. Dec. 357, it was held that a statute making promissory notes the subject of larceny did not extend to bank notes. The contrary was decided in Damewood v. State, 1 How. (Miss.) 262. While a due-bill is not a promissory note, it is an obligation, and as such is the subject of larceny under a statute, unless it has been paid: State v. Campbell, 103 N. C. 344, 9 S. E. 410. Bank bills, though declared worthless, are property in the hands of bona fide holders: Starkey v. State, 6 Ohio St. 266. Bank bills are not money as viewed by the Ohio supreme court in Johnson v. State, 11 Ohio St. 324. But see Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South. 659. Certificates of stock are the subject of larceny: People v. Griffin, 38 How. Pr. 475. An ordinary common receipt is not: People v. Griffin, 38 How. Pr. 475; People v. Bradley, 4 Park. C. C. 245. But an accountable receipt is: People v. Bradley, 4 Park. C. C. 245. And a receipt or release may be the subject of theft by statute: Commonwealth v. Williams, 9 Met. 273. Railroad tickets taken up and punched by a conductor are accountable receipts and may be stolen: State v. Wilson, 95 Iowa, 341, 64 N. W. 266; Millner v. State, 15 Lea, 179; State v. Musgang, 51 Minn. 556, 53 N. W. 874. But a railroad pass not yet filled out or ready to be issued is not the subject of larceny: State v. Musgang, 51 Minn. 556, 53 N. W. 874. And a passenger railroad ticket, not yet stamped or dated so that it could be used, cannot be stolen: State v. Hill, Houst. C. Rep. 420; McCarty v. State, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299. A memorandum-book may be the subject of larceny: Commonwealth v. Williams, 9 Met. 273; and property (checks) used for gaming purposes: Bales v. State, 3 W. Va. 685; or any printed checks, where the person issuing them has made an agreement with others to redeem them: State v. Stewart, 1 Marv. 542, 41 Atl. 188. A satisfaction piece which has never been delivered is not the subject of larceny: People v. Stevens, 38 Hun, 62.

b. **Animals.**—Domestic animals are usually the subject of larceny, such as cattle: Hubotter v. State, 32 Tex. 479; McIntosh v. State, 18 Tex. App. 284; a steer being an animal of the cow kind: McIntosh v. State, 18 Tex. App. 284; Watson v. State, 55 Ala. 150; horses, colts, and mules: State v. Major, 14 Rich. 76; pea fowls: Commonwealth v. Beaman, 8 Gray, 497; turkeys: State v. Turner, 66 N. C. 618; bees in the possession of the owner: State v. Murphy, 8 Blackf. 498; and in fact any domestic animal which has an owner and is property: State v. Turner, 66 N. C. 618; Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573. Neither the words "horse" nor "mare"

in a statute include geldings: Keesee v. State, 1 Tex. App. 298; Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414; the word being used in a specific and not a generic sense.

Animals ferae naturae are not the subject of larceny while in their natural state: State v. Murphy, 8 Blackf. 498; State v. Turner, 66 N. C. 618. A coon is an animal ferae naturae and is not the subject of larceny: Warren v. State, 1 G. Greene, 106. So, also, are doves, unless they are in the custody of the owner, as when they are in a dove-house: Commonwealth v. Chace, 9 Pick. 15, 19 Am. Dec. 348; and an otter, unless it is reclaimed, confined, or dead: State v. House, 65 N. C. 315, 6 Am. Rep. 744. When animals ferae naturae are reclaimed, confined, or dead, the stealing of them from their owner is larceny: State v. House, 65 N. C. 315, 6 Am. Rep. 744. So a tamed mocking-bird may be stolen: Haywood v. State, 41 Ark. 479; and fish if reclaimed or confined or dead or valuable for food or otherwise: State v. Krider, 78 N. C. 481; and oysters, if planted where they do not naturally grow, and designated by stakes or otherwise, so that they can be readily identified: State v. Taylor, 27 N. J. L. 117, 72 Am. Dec. 347. But a sable caught in a trap in the woods is not the subject of larceny: Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 578.

Animals of a base nature, such as dogs, cats, bears, foxes, monkeys, and ferrets, were not, at common law, the subject of larceny: Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573. And this was so, even though such animals had been reclaimed. And of animals ferae naturae which, when reclaimed, were the subject of larceny, might be included pigeons, doves, hares, deer, swans, wild bears, cranes, pheasants, partridges, and fish for food: Hurley v. State, 30 Tex. App. 338, 28 Am. St. Rep. 916, 17 S. W. 455, quoting from Bishop's Criminal Law.

c. Dogs.—At common law dogs were deemed, in contemplation of law, of a base nature, and larceny could not be committed of them: Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772; State v. Holder, 81 N. C. 527, 31 Am. Rep. 517; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355; Mullaly v. People, 86 N. Y. 365; Commonwealth v. Hazelwood, 84 Ky. 681, 2 S. W. 489. And this appears to have been true, although the owner may have a property in them, and they may be of value: State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355. And the fact that the right of property in dogs is protected by civil remedies does not make them the subject of larceny: State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772. The courts have been very conservative about declaring that dogs may be the subject of theft, notwithstanding the law may recognize them as property: State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

But dog thieves have not been the beneficiaries of such liberal treatment in all states. Thus, in Kansas, under a statute defining larceny as the taking and carrying away of any personal property or valuable thing, it was held that a dog was property or valuable thing, and could be stolen: Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355. And a similar sensible rule has been adopted elsewhere: Commonwealth v. Hazelwood, 84 Ky. 681, 2 S. W. 489; Hamby v. Samson, 105 Iowa, 112, 67 Am. St. Rep. 285, 74 N. W. 918. See People v. Campbell, 4 Park. C. Rep. 386; People v. Maloney, 1 Park. C. Rep. 593; Mullaly v. People, 86 N. Y. 365; People v. McMaster, 10 Abb. Pr., N. S., 132; State v. Brown, 9 Baxt. 53, 40 Am. Rep. 81; State v. Langford, 55 S. C. 322, 33 S. E. 370; Hurley v. State, 30 Tex. App. 333, 28 Am. St. Rep. 916, 17 S. W. 455. The fact that dogs are taxed for revenue the same as other property is a strong circumstance to show an intent to treat dogs as other personal property: State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; People v. Campbell, 4 Park. C. Rep. 386; Commonwealth v. Hazelwood, 84 Ky. 681, 2 S. W. 489; State v. Langford, 55 S. C. 322, 33 S. E. 370.

In Mullaly v. People, 86 N. Y. 365, it was pointed out that the common-law rule was extremely technical and could scarcely be said to have had a sound basis to rest on. In Hamby v. Samson, 105 Iowa, 112, 67 Am. St. Rep. 285, 74 N. W. 918, while admitting that under the strict common-law definition, "goods and chattels" would not include dogs, the court declined to adopt this rule, and held that the common understanding of the meaning of such words would be resorted to, and that in such a view dogs were clearly chattels, and the subject of larceny. Though a dog may not be the subject of larceny, his collar may be: State v. Butler, 2 Penne. (Del.) 127, 43 Atl. 480.

d. **Property Annexed to Freehold.**—Property annexed to the freehold so as to become a part thereof is not the subject of larceny, since it is not personal property: State v. Hall, 5 Harr. 492; United States v. Smith, 1 Cranch C. C. 475, Fed. Cas. No. 16,325; Langston v. State, 96 Ala. 44, 11 South. 334; Holly v. State, 54 Ala. 238.

Thus, it has been held that logs in a fence or fence rails are not the subject of larceny: United States v. Smith, 1 Cranch C. C. 475, Fed. Cas. No. 16,325; if the severance and the carrying away were one continued act: United States v. Wagner, 1 Cranch C. C. 314, Fed. Cas. No. 16,630. And copper pipes attached to machinery in a building: State v. Davis, 22 La. Ann. 77. Also valves screwed to iron pipes fastened securely to the inside of a building so as to become a part thereof: Langston v. State, 96 Ala. 44, 11 South. 334.

This was the common-law rule, and with it went that other recognized rule that after being detached from the realty such property was the subject of larceny: Holly v. State, 54 Ala. 238; Beall v.

State, 68 Ga. 820. But the modern tendency is to confine these rules within the narrowest possible limits. And it has been held that the rule that the severance and carrying away of personal property annexed to real estate must be separated by time, so as not to constitute one transaction, does not apply to articles which do not adhere to the freehold and which may be removed without injury: Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157. Hence, in this case it was held that the simultaneous removal and carrying away of rails from a fence, with felonious intent, is theft, the court saying: "We see no good reason why we should not hold the sensible rule that by the act of the severance the thief converts the property into a chattel; and if he then removes it with a felonious intent, he is guilty of larceny, whatever may be the dispatch employed in the removal." This case followed the rule laid down in Ex parte Willke, 34 Tex. 155, where eleven doors were detached from a house and removed with intent to steal, and the court held the offense to be larceny. So, the removal of a key from the lock of a door of a house is larceny: Hoskins v. Torrence, 5 Blackf. 417, 35 Am. Dec. 129. And in Jackson v. State, 11 Ohio St. 104, where a leathern belt connecting certain wheels in a sawmill were taken without injury to any of the property, the court said that "the rule of the common law, that things savoring of the realty are not subjects of larceny, applies only to things issuing out of, or growing upon, the lands, and such as adhere to the freehold, but not to personal chattels which are constructively annexed thereto." A similar rule was followed in Smith v. Commonwealth, 14 Bush, 31, 29 Am. Rep. 402, where chandeliers attached to the freehold were held to be the subject of larceny; and in Clement v. Commonwealth, 20 Ky. Law Rep. 688, 47 S. W. 450, where copper boxes connected with a still by a pipe screwed into the still were deemed the subject of theft, though constructively a part of the freehold.

e. Property Savoring of Realty.—As already intimated, property which savors of the realty, such as things issuing out of, or growing upon, land, is not the subject of larceny where the severing and appropriation are one continuous act: See Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157; Holly v. State, 54 Ala. 238; Jackson v. State, 11 Ohio St. 104. But if the severance and the carrying away are separated by time, the offense will be larceny: Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157. No particular space of time is necessary, the only criterion being that there must be such a separation between the severance and the taking that they will not constitute one transaction: People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262. If the property, after being detached, is left on the freehold for a moment, it is personalty and may be stolen; but if it is kept in the hands of the thief until he leaves the premises, it is still a part of the realty, and only a

trespass is committed: Smith v. Commonwealth, 14 Bush, 31, 29 Am. Rep. 402.

Hence, a growing crop cannot be stolen if the severing and carrying away is by one act: Comfort v. Fulton, 39 Barb. 56; State v. Stephenson, 2 Bail. 334. So, the digging of potatoes or cutting of cabbages and instantly removing them by the same act is trespass only: Bell v. State, 4 Baxt. 426. As is also the picking and carrying away of fruit: Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675. And the taking and carrying away of quartz rock not yet severed from the realty: People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262; State v. Burt, 64 N. C. 619. But where the indictment charged the stealing of "a quantity of specimens of gold and silver ores," it was held that there was nothing to show that the property savored of the realty: People v. Freeman, 1 Idaho, 322. The taking of coal is larceny where the severance and carrying away do not constitute one and the same act: Commonwealth v. Steimling, 156 Pa. St. 400, 27 Atl. 297. Trees which have been severed from the soil and cut into cordwood are the subject of larceny: State v. Parker, 34 Ark. 158, 36 Am. Rep. 5.

The common-law rule that larceny cannot be committed of property which savors of the realty has been severely criticised in many cases. The distinction which requires the severance and asportation to be acts separated in point of time involves a technical nicety which, as some courts express it, appears to be pure absurdity. In People v. Williams, 35 Cal. 671, the court, while feeling itself bound to follow the established common-law rule, condemns it, and calls the attention of the legislature to the matter. That these protests have not been in vain is abundantly evidenced by numerous legislative enactments changing the common-law rule. Thus, in the California case just cited, gold-bearing quartz rock was held not to be the subject of larceny, where it was not first severed from the land. But by statute, the stealing of gold ore is made larceny, whether the ore has been previously severed from the realty or not: People v. Opie, 123 Cal. 294, 55 Pac. 989. So growing crops have been made the subject of larceny, although not previously severed from the soil: Sullins v. State, 53 Ala. 474; State v. Stephenson, 2 Bail. 334. And in Wisconsin it is made larceny to sever standing timber or trees from the soil of another and convert them to the taker's use: Golonbieski v. State, 101 Wis. 333, 77 N. W. 189. See Carl v. State, 125 Ala. 89, 28 South. 505. Turpentine, which has run out of trees into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny: State v. Moore, 33 N. C. 70.

f. **Lost Property.**—Property which has been thrown away and abandoned becomes no man's property. The former owner loses his title and all claim to it, and one who finds it can claim it as his own: McGoon v. Ankeny, 11 Ill. 558. Hence, property which has been abandoned is not the subject of larceny. But if there has

been no abandonment, generally speaking, personal property may be stolen: Sikes v. State (Tex. Cr. App.), 28 S. W. 688.

Property merely mislaid, or placed in a particular place and forgotten, is not technically lost, but is still in the constructive possession of the owner, and is, therefore, the subject of larceny: Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644. Hence, a purse or money inadvertently left in a particular place and forgotten is merely mislaid and may be stolen: Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644; Pyland v. State, 4 Sneed, 357; State v. McCann, 19 Mo. 249; Roberts v. State, 83 Ga. 369, 9 S. E. 675. A bucket of peas, mislaid in a cart which was erroneously supposed to belong to a friend, may be the subject of theft: State v. Farrow, Phillips, 161, 93 Am. Dec. 585. See, also, State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208, as to mislaid property.

As to property genuinely lost, it is held in Tennessee that such property is not the subject of larceny, since there can be no trespass upon the owner's possession: Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644; Porter v. State, Mart. & Y. 226. The rule in Tennessee appears to have been changed by statute, to this extent at least, that if, at the time the property is found, the finder knows who the owner is, he is guilty of larceny if he feloniously appropriates it: Mayes v. State (Tenn.), 4 S. W. 659.

Apparently, in every jurisdiction other than Tennessee, lost property is the subject of larceny: See State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; Ransom v. State, 22 Conn. 153; People v. Buelna, 81 Cal. 135, 22 Pac. 396; Kennedy v. Woodrow, 6 Houst. 46; Lane v. People, 10 Ill. 305; State v. Taylor, 25 Iowa, 273; State v. Dean, 49 Iowa, 73, 31 Am. Rep. 143; State v. Bolander, 71 Iowa, 706, 29 N. W. 602; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Boyd, 36 Minn. 538, 32 N. W. 780; People v. Swan, 1 Park. C. Rep. 9; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; State v. Swayze, 11 Or. 357, 3 Pac. 574; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732; Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790; Rhodes v. State, 11 Tex. App. 563; Tanner v. Commonwealth, 14 Gratt. 635.

But certain conditions must exist at the time the property is found or the finder is not guilty of larceny. Subsequently, we shall see that he must have the felonious intent to appropriate the property at the time he finds it, or it is not larceny. Aside from this, the finder must either know or have the means of knowing who the owner is: State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; People v. Buelna, 81 Cal. 135, 22 Pac. 396; Kennedy v. Woodrow, 6 Houst. 46; Lane v. People, 10 Ill. 305; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297; State v. Clifford,

14 Nev. 72, 33 Am. Rep. 526; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Tanner v. Commonwealth, 14 Gratt. 635.

If the finder knows who the owner is and does not restore the property to him, the offense will be larceny: State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; People v. Buelna, 81 Cal. 135, 22 Pac. 396; Kennedy v. Woodrow, 6 Houst. 46; Lane v. People, 10 Ill. 305; State v. Taylor, 25 Iowa, 273; State v. Bolander, 71 Iowa, 706, 29 N. W. 602; State v. Dean, 49 Iowa, 73, 31 Am. Rep. 143; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; State v. Swayze, 11 Or. 357, 3 Pac. 574; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732.

Of this portion of the rule there is not the slightest doubt. If the finder knows the owner, he must return the property to him. The difficulty arises when the owner is not known. In such a case, to what extent must the finder have means of discovering the owner? Must the property itself contain marks of identification? Should the finder advertise the property? It is frequently said that the finder must have means of knowing the owner: State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297.

In Kennedy v. Woodrow, 6 Houst. 46, it was said that the finder must have reason to know who the owner is. The rule laid down by the California Penal Code, section 485, is that the property must be found under circumstances which give the finder knowledge or means of inquiry as to the true owner: People v. Buelna, 81 Cal. 135, 22 Pac. 396. Under the Iowa code the finder must know who the owner is: State v. Taylor, 25 Iowa, 273; State v. Bolander, 71 Iowa, 706, 29 N. W. 602. And he is not bound to exercise diligence to ascertain the owner: State v. Dean, 49 Iowa, 73, 31 Am. Rep. 143. The generally accepted rule seems to be that if the finder knows the owner, or has the immediate means of ascertaining him, or has reason to believe, and does believe, that he will be found, the offense is larceny: See State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Boyd, 36 Minn. 538, 32 N. W. 780; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731.

In some of the cases, in applying this rule, it is stated that the finder should have the means of identifying the owner instanter: Lane v. People, 10 Ill. 305; People v. Cogdell, 1 Hill, 94, 37 Am. Dec. 297. If there are marks on the property by which the owner may be ascertained, the finder must restore the property, if possible, or it will be larceny: Lane v. People, 10 Ill. 305; State v. Swayze, 11 Or. 357, 3 Pac. 574; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526. But it is not necessary that there should be any

marks of identification on the lost goods, if the finder really believes the owner can be found: State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732. Thus, where a lady's watch is found, with the family name of the owner clearly engraved thereon, and there were ladies in the vicinity, to one of whom it belonged, the finder is sufficiently put upon notice of ownership, and keeping the watch with felonious intent is larceny: Stepp v. State, 31 Tex. Cr. Rep. 349, 20 S. W. 753.

There should be some apparent means of ascertaining the owner existing at the time the property is found, or the offense will not be larceny, because it might be possible by advertising and other inquiry to find the owner eventually, while the guilt of the defendant must attach at the moment, if ever, without depending on any future uncertainties: Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790. A finder of goods is under no obligation to advertise them, so far as the crime of larceny is concerned: Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182. An early Vermont case lays down a different rule, apparently based upon a local statute: State v. Jenkins, 2 Tyler, 377. Certainly, no such rule exists at the present day, in the absence of statute.

As has been pointed out in another connection when discussing the question of trespass, cattle or other domestic animals straying from their accustomed inclosure, or running at large, are not lost in the ordinary sense of such term. Such animals may, therefore, be stolen: See, further, State v. Martin, 28 Mo. 530; Lamb v. State, 40 Neb. 312, 58 N. W. 963; Rorer v. State (Tex. Cr. App.), 28 S. W. 951. Straying animals may be apparently lost, and a finder not be guilty of larceny by appropriating them: State v. Swayze, 11 Or. 357, 3 Pac. 574. In the Indian Territory, by statute, it is not larceny to take up and appropriate an unbranded animal running at large: Dansby v. United States, 2 Ind. Ter. 456, 51 S. W. 1083.

The finding of an article by direction of the owner, and taking it as bailee, but afterward concealing it and denying the finding, is merely a breach of the bailment and not larceny: State v. England, 8 Jones, 399, 80 Am. Dec. 334.

g. **Value of Property.**—Generally, in order to constitute larceny, the property taken must be of some value: State v. Lambert, 21 Mo. App. 301; Lane v. State, 113 Ga. 1040, 39 S. E. 463; Langford v. State, 8 Tex. 115; Culp v. State, 1 Port. 33, 26 Am. Dec. 357; Wilson v. State, 1 Port. 118; Ellison v. State, 25 Tex. App. 328, 8 S. W. 462. Hence an undelivered receipt, which is of no value to anyone, cannot be the subject of larceny: People v. Loomis, 4 Denio, 380. So of a letter which is without value: Payne v. People, 6 Johns. 103; and a railroad ticket which is not stamped or dated, and which cannot, therefore, be used by anyone: State v. Hill, Houst. C. Rep. 420. But the property taken need not be of value to the thief. It

is enough if the owner has been deprived of a valuable thing: People v. Phelps, 49 How. Pr. 437. Hence, stenographic notes of testimony which have no intrinsic value except as a report of such testimony are the subject of larceny: People v. McGrath, 5 Utah, 525, 17 Pac. 116.

In a prosecution for an attempt to commit larceny, it is not necessary to allege or prove the value of the property intended to be stolen: Pooler v. State, 97 Wis. 627, 73 N. W. 336.

VII. Ownership.

a. Of Another.—The property must be owned by some one other than the thief: Lawrence v. State, 20 Tex. App. 536; Tervin v. State, 37 Fla. 396, 20 South. 551; State v. Moore, 101 Mo. 316, 14 S. W. 182; Commonwealth v. Tobin, 2 Brewst. 570; State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072; Bruley v. Rose, 57 Iowa, 651, 11 N. W. 629; People v. Stone, 16 Cal. 369; State v. Gray, 37 Mo. 463; Fields v. State, 6 Cold. 524; Williams v. State, 34 Tex. 558.

But it is not essential that the thief should know who is the owner of the stolen property. Ignorance is no excuse: Tervin v. State, 37 Fla. 396, 20 South. 551; Lawrence v. State, 20 Tex. App. 536. It is sufficient if he knows that the property is not his own, and he takes it to deprive the true owner of it: Lawrence v. State, 20 Tex. App. 536; Tervin v. State, 37 Fla. 396, 20 South. 551. So one who buys property of another, knowing it did not belong to such person, and knowing to whom it did belong, may be guilty of larceny: People v. Dunn, 114 Mich. 355, 72 N. W. 172; Baxter v. State (Tex. Cr. App.), 43 S. W. 87.

b. What Ownership is Sufficient.—A special ownership or possession is sufficient: Littleton v. State, 20 Tex. App. 168. A general owner of goods may be guilty of larceny in stealing such goods from a special owner: Adams v. State, 45 N. J. L. 448. Possession of property is sufficient proof of ownership usually: State v. Bishop, 98 N. C. 773, 4 S. E. 357. So the mere taker of an estray animal is a sufficient owner, from whom the animal may be stolen: Quinn v. People, 123 Ill. 333, 15 N. E. 46. A bailee is an owner from whom property may be stolen: State v. Moore, 101 Mo. 316, 14 S. W. 182. Mortgagors of personal property who are entitled to its possession have an interest therein which is the subject of larceny: State v. Quick, 10 Iowa, 451. Where a hotel is kept by one person, but it is owned by, and the license to keep the same is issued to, another, property stolen therefrom is properly alleged to have been taken from the dwelling-house of the former: State v. Leedy, 95 Mo. 76, 8 S. W. 245. A trespasser, who finds bees on the land of another and hives them, but is not the owner of the hive in which he puts them, has no interest in them, which is the subject of larceny: State v. Repp, 104 Iowa, 305, 65 Am. St. Rep. 463, 73 N. W. 829.

c. **Larceny of One's Own Property.**—Under ordinary circumstances, it is impossible for one to commit larceny by taking possession of his own property: Adams v. State, 45 N. J. L. 448; People v. Mackinley, 9 Cal. 250; Commonwealth v. Tobin, 2 Brewst. 570; State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072; Fairy v. State, 18 Tex. App. 314; Bonham v. State, 65 Ala. 456; Alfele v. Wright, 17 Ohio St. 238, 93 Am. Dec. 615.

Hence one is not guilty of larceny for appropriating a deed made to himself and which is in his possession: People v. Mackinley, 9 Cal. 250. So a chattel mortgagor cannot steal a mortgage in his possession, executed by himself: State v. Grisham, 90 Mo. 163, 2 S. W. 223; though the statute involved here related to embezzlement. It has been held that one could not steal his own property from a bailee: Commonwealth v. Tobin, 2 Brewst. 570. But the rule certainly is very firmly established that a person may be guilty of larceny in stealing his own property when it is done with an intent to charge another with its value: Palmer v. People, 10 Wend. 165, 25 Am. Dec. 551. So where one takes his own property with the intent of depriving another of a lien therein, it may be larceny: State v. Stephens, 32 Tex. 155. And the taking of one's own goods from a bailee, if done with the intent to charge the bailee, is larceny: People v. Thompson, 34 Cal. 671; People v. Stone, 16 Cal. 369; State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072; Adams v. State, 45 N. J. L. 448. A pledgor taking his property from the pledgee to deprive the latter of his security therein may be larceny: Henry v. State, 110 Ga. 750, 78 Am. St. Rep. 137, 36 S. E. 55; Bruley v. Rose, 57 Iowa, 651, 11 N. W. 629. So a mortgagee in possession of personal property has such a title that a felonious taking by the mortgagor would be larceny: People v. Stone, 16 Cal. 369. And the owner of property sold at a sheriff's sale may commit theft of it: Robinson v. State, 1 Ga. 563. Where property merely in the possession of a bailee is taken by the owner at the request of an officer who has levied an attachment on it, the offense is not larceny: Clarke v. State, 41 Neb. 870, 59 N. W. 785. Joint owners cannot steal from each other: Bell v. State, 7 Tex. App. 25; Kirksey v. Fike, 29 Ala. 206. Neither can tenants in common: Kirksey v. Fike, 29 Ala. 206. A part owner of property cannot be convicted for theft of it, unless the person from whom he took it was entitled to the exclusive possession of it at the time of the taking: Fairy v. State, 18 Tex. App. 314. So one who is entitled to a small part of a sum of money may, nevertheless, commit larceny of the entire amount: Commonwealth v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858.

If a cropper on land is a part owner of the crop raised, he cannot be convicted of larceny of such crop: Bonham v. State, 65 Ala. 456; Bell v. State, 7 Tex. App. 25. But if he is not a joint tenant or a tenant in common with the land owner, he may commit larceny of it: State v. Gay, 1 Hill (S. C.), 364. And if a cropper abandons

the crop before maturity, forfeiting his interest therein, he may commit larceny of it: Bonham v. State, 65 Ala. 456. Or if he has surrendered his possession to the landlord, he will commit larceny if he takes and appropriates it, notwithstanding his interest in the crop: State v. Webb, 87 N. C. 558.

Partners cannot commit larceny of the partnership property: Jones v. State, 76 Ala. 8; Alfele v. Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Phelps v. State, 109 Ga. 115, 34 S. E. 210.

d. Larceny by Husband and Wife.—At common law, neither husband nor wife could be found guilty of larceny by converting the property of the other: Thomas v. Thomas, 51 Ill. 162; State v. Banks, 48 Ind. 197; Lamphier v. State, 70 Ind. 317; Overton v. State, 43 Tex. 616. The reason is that, in the eye of the law, husband and wife are one person: State v. Banks, 48 Ind. 197. But a third person may be convicted of larceny of community property, notwithstanding the wife consents to the taking, where she consented to have it taken with the felonious intention of depriving her husband of it: People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67. One who has committed or intends to commit adultery with another's wife may be convicted of larceny if he feloniously takes the husband's property, even with the wife's consent: State v. Banks, 48 Ind. 197; Lamphier v. State, 70 Ind. 317. The wife's consent after she has repudiated her relation of wife will not aid the thief: People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67. The adulterous intercourse, said the court in this case, "did not make the offense larceny, but it threw a clear light upon the intent of taking, as showing that the wife's consent was without her husband's knowledge, against his will, and that the defendant knew the facts, and that his intention in taking it was to steal from the husband." See, also, People v. Cole, 43 N. Y. 508. It is not larceny for a husband to sell his wife's property as his own: Watkins v. State, 60 Miss. 323.

Statute may, however, change this particular relation existing between husband and wife. And in Indiana it has been held that the married women's acts have had such effect, and that a husband may, therefore, be guilty of larceny of the goods of his wife: Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35.

VIII. Consent of Owner.

a. In General.—The property must be taken without the consent and against the will of the owner: Dodd v. Hamilton, 4 N. C. 471; Woods v. State, 28 Tex. App. 490, 10 S. W. 108; Dodge v. Brittain, Meigs, 84; Welsh v. People, 17 Ill. 339; State v. McCartey, 17 Minn. 76; Emerson v. State, 33 Tex. Cr. Rep. 89, 25 S. W. 289; State v. Adams, 115 N. C. 775, 20 S. E. 722; McAdams v. State, 8 Lea, 456; Pigg v. State, 43 Tex. 108; People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425. Because if the owner voluntarily parts with the possession, the trespass necessary to constitute the offense

will not usually exist: Welsh v. People, 17 Ill. 339. So where one intrusts personal property to another to procure a loan on it, and the latter procures the loan, but appropriates the proceeds, it is not larceny of the pledged property: People v. Cruger, 102 N. Y. 510, 55 Am. Rep. 830, 7 N. E. 555. The taking of property from a drunken man, with his consent, for the purpose of taking care of it for him, would not be larceny: Moye v. State, 65 Ga. 754. But if the taker intended to convert it, the fact that the drunken man consented to the taking for the purpose of taking care of it would not prevent the offense from being larceny: Schafer v. State (Ala.), 8 South. 670.

A slave can give no consent to another to take possession of his master's property: Hite v. State, 9 Yerg. 198. Neither can a servant, ordinarily, who merely has the custody of his master's property: State v. McCartey, 17 Minn. 76. It is not necessary to allege or prove the want of consent of a temporary custodian of property: Emmerson v. State, 33 Tex. Cr. Rep. 89, 25 S. W. 289.

b. Consent to Entrap Thief.—A theft is not committed with the consent of the owner of the property merely because he furnishes opportunities to the thief, where it is done for the sole purpose of entrapping him: Varner v. State, 72 Ga. 745. The mere fact that one does not prevent the commission of a theft when he might do so does not prevent the offense from being larceny: State v. Adams, 115 N. C. 775, 20 S. E. 722. A man may direct his servant or a third person to appear to encourage the design of a thief, and lead him on until the offense is complete, if he does not induce the original intent, but only provides for its discovery after it has been formed: McAdam v. State, 8 Lea, 456; Alexander v. State, 12 Tex. 540. An owner does not give his consent to a theft by obtaining the aid of a detective who for the purpose of detection joins the accused in a criminal act, where the whole matter is designed by the accused and carried into actual execution by theft: Pigg v. State, 43 Tex. 108. So where parties have planned and conspired to enter and rob a store, the employment of a detective by the merchant, who consorts with the conspirators, and who has a key to facilitate entrance to the store, does not affect the criminality of the offense, unless the merchant or the detective suggested the offense or originated the criminal intent or agreement: Johnson v. State, 3 Tex. App. 590. The placing of a horse where it can be stolen does not show a taking with the consent of the owner, where the owner in no way suggested the theft to the defendant, or induced him to commit it: Conner v. State, 24 Tex. App. 245, 6 S. W. 188. Neither is consent shown where the owner of the property feigns drunkenness for the purpose of entrapping the thief: People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425.

If, however, the owner's agent helps to plan the theft and assists in its commission, there is no larceny, for the owner has given his consent to its commission: McAdam v. State, 8 Lea, 456. So if

detectives solicit the commission of the crime, and decoy the thief into taking the property, he gains possession thereof with the owner's consent: Johnson v. State, 3 Tex. App. 590; Speiden v. State, 3 Tex. App. 156, 30 Am. Rep. 126. The object of the law is to prevent larceny by punishing it, and not to procure the commission of the offense that the defendant may be punished. So where a thief is persuaded to take the property by a servant of the owner, at the owner's request, the taking is not against the will of the owner, and larceny is not committed: State v. Adams, 115 N. C. 775, 20 S. E. 722. Also where an authorized agent of the owner cooperates with the suspected thieves in planning and executing the offense, larceny is not committed: State v. Hull, 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159. And where one pretending to be an accomplice of the thief performs acts for the owner amounting to the physical constituents of larceny, as where he delivers the property to the thief, there is no taking without the owner's consent, and hence no larceny: Williams v. State, 55 Ga. 391.

c. **Consent Induced by Fear or Fraud.**—We have already noticed that the taking of money by putting in fear is usually robbery. Yet there may be larceny, at least by virtue of a statute, where threats have been used: See Williams v. United States, 3 App. Cas. (D. C.) 335; State v. Kallaher, 70 Conn. 398, 66 Am. St. Rep. 116, 39 Atl. 606. But where consent is obtained by mere threats of prosecution, or fear of loss of reputation, the offense is not larceny. Fear under such circumstances does not nullify consent: Haley v. State, 49 Ark. 147, 4 S. W. 746.

We have also noted at considerable length that where the possession of property is obtained by a trick, or fraud, or false pretense, the offense will be larceny, if the intent to steal exists at that time, since the fraud vitiates the owner's consent, and the trespass necessary to complete the offense is committed: See People v. Montarial, 120 Cal. 691, 53 Pac. 355; Hecox v. State, 105 Ga. 625, 31 S. E. 592; Ennis v. State, 3 G. Greene, 67; State v. Watson, 41 N. H. 533; State v. Bryant, 74 N. C. 124; State v. MacRae, 111 N. C. 665, 16 S. E. 173; People v. Dimick, 107 N. Y. 13, 14 N. E. 178.

d. **Property Delivered by Mistake.**—Where money or other property is delivered by mistake, especially where a larger sum of money is parted with than is intended, and the receiver takes such property with knowledge of the mistake and with the intent to keep it, the offense will be larceny, since there is no consent on the part of the owner to part with the excessive amount or with the other property delivered by mistake: Bailey v. State, 58 Ala. 414; State v. Williamson, Houst. C. C. 155; Cooper v. Commonwealth, 22 Ky. Law Rep. 1627, 60 S. W. 988; Wolfstein v. People, 6 Hun, 121; State v. Drecker, 8 Or. 394, 34 Am. Rep. 590; Fulcher v. State, 32 Tex. Cr. Rep. 621, 25 S. W. 625; People v. Miller, 4 Utah, 411, 11 Pac. 514; Bergeron v. Payton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291.

The most common case of property delivered by mistake is where an overpayment of money is made. Thus, where one goes to a bank to obtain money either on a check or to secure change, and the teller by mistake hands to the customer a larger sum than he intends or than the customer is entitled to receive. In such a case, if the money is taken with knowledge of the mistake and with an intent to keep it, the offense is larceny: See Cooper v. Commonwealth, 22 Ky. Law Rep. 1627, 60 S. W. 938; Wolfstein v. People, 6 Hun, 121; State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; Fulcher v. State, 32 Tex. Cr. Rep. 621, 25 S. W. 625; Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291. And where one, in payment of a bill of goods, gives a hundred dollar bill, intending to give ten dollars, and the seller, with knowledge of the mistake, returns change for ten dollars only, and appropriates the balance, he is guilty of larceny: State v. Williamson, Houst. C. C. 155.

For convenience, we notice at this point the question of intent in taking property delivered by mistake, whether this felonious intent must exist at the time the property is taken, or whether it can arise subsequent thereto. The weight of authority clearly holds that to constitute larceny in receiving an overpayment, the defendant must know of the mistake at the time of the overpayment, and must at that time have the intent to steal: Cooper v. Commonwealth, 22 Ky. Law Rep. 1627, 60 S. W. 938; State v. Williamson, Houst. C. C. 155; Fulcher v. State, 32 Tex. Cr. Rep. 621, 25 S. W. 625. It has been held in some cases that where the mistake is not known by the taker at the time, but was afterward, and the intent to feloniously appropriate was then formed and executed, the crime would in that case also be larceny: Wolfstein v. People, 6 Hun, 121. And see State v. Ducker, 8 Or. 394, 34 Am. Rep. 590. And a Wisconsin case supports the same rule: Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291; and this holding seems to be proper in view of the statutory law of that state. But a very recent case in Kentucky appears to hold clearly to the contrary, and to be in harmony with the weight of authority: Cooper v. Commonwealth, 22 Ky. Law Rep. 1627, 60 S. W. 938.

IX. Intent.

a. Necessity for.—The authorities are unanimous in holding that to constitute larceny, the taking must be accompanied with circumstances showing a felonious intent. It is almost needless to cite authorities upon such a self-evident and fundamental proposition in the law of larceny. Practically all of the cases cited mention this element of felonious intent as essential. But see, particularly, Smith v. Shultz, 2 Ill. 490, 32 Am. Dec. 33; Umphrey v. State, 68 Ind. 223; State v. Gresser, 19 Mo. 247; Waidley v. State, 34 Neb. 250, 51 N. W. 830; Devine v. People, 20 Hun, 98; Williams v. State, 44 Ala. 396; Wood v. State, 34 Ark. 341, 36 Am. Rep. 12; Doss v.

People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; Logan v. State, 2 Tex. App. 408; Landon v. State, 10 Tex. App. 63; Mullins v. State, 37 Tex. 337; Taylor v. State, 12 Tex. App. 489; Knutson v. State, 14 Tex. App. 570; McCourt v. People, 64 N. Y. 583; State v. Lindley, 13 S. Dak. 248, 83 N. W. 257; Blunt v. Commonwealth, 4 Leigh, 689, 26 Am. Dec. 341; State v. Schingen, 20 Wis. 74.

The mere unlawful or tortious taking is not sufficient, without the felonious intent: Umphrey v. State, 63 Ind. 223; Williams v. State, 44 Ala. 396. So an unintentional taking cannot be larceny: Long v. State, 11 Fla. 295. Neither can a taking for fun and returning the property: Devine v. People, 20 Hun, 98. Hence, the temporary taking of a chicken in sport is not larceny: Colwell v. State (Tex. Cr. App.), 34 S. W. 615. And one who, while partly intoxicated, enters another's cellar and takes a drink of cider, after being refused permission to take a drink, is not larceny, since there is no felonious intent: McCourt v. People, 64 N. Y. 583. So one too drunk to entertain a felonious intent cannot be convicted of larceny: Wood v. State, 34 Ark. 341, 36 Am. Rep. 13. As has already been pointed out, an open taking may or may not be larceny, according to the intent with which it is done. But the fact that property is taken openly and in the owner's presence does not generally create a presumption against a felonious intent. There is no presumption of law on the question of intent, unless the proof leaves no room for any reasonable inference either way: Talbert v. State, 121 Ala. 33, 25 South. 690.

It is conceivable that certain kinds of larceny may, by statute, be declared such, irrespective of the question of intent to steal. And in Alabama, it seems that in defining the statutory offense of larceny of an outstanding crop, intent to steal is not made a necessary element, the illegal depredation on the outstanding crop supplying the place of an intent to steal when such intent is wanting: Newsom v. State, 107 Ala. 133, 18 South. 206.

b. When Intent must Exist.—As a general rule, subject to a few exceptions, which will be noticed later, the felonious intent to steal the property must exist at the time the property is taken, or the crime of larceny is not committed: Fulton v. State, 13 Ark. 168; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; Keely v. State, 14 Ind. 36; State v. Wood, 46 Iowa, 116; State v. Conway, 18 Mo. 321; State v. Ware, 62 Mo. 597; Wilson v. People, 39 N. Y. 459; Abrams v. People, 6 Hun, 491; Stillwell v. State, 155 Ind. 552, 58 N. E. 709; Quitzow v. State, 1 Tex. App. 47, 28 Am. Rep. 396; Morrison v. State, 17 Tex. App. 34, 50 Am. Rep. 120; Hernandez v. State, 20 Tex. App. 151; Wilson v. State, 20 Tex. App. 662; State v. McRae, 111 N. C. 665, 16 S. E. 173; Hill v. State, 57 Wis. 377, 15 N. W. 445; People v. Miller, 4 Utah, 410, 11 Pac. 514; Blunt v. Commonwealth, 4 Leigh, 689, 26 Am. Dec. 341. If the original possession was lawfully obtained, and the bailee's intent was honest, the defendant cannot commit larceny, though he

may subsequently have conceived the felonious intent of appropriating the property to his own use: State v. Wood, 46 Iowa, 116; Wilson v. People, 89 N. Y. 459; Beatty v. State, 61 Miss. 18; Commonwealth v. Smith, 1 Clark (Pa.), 400; Stillwell v. State, 155 Ind. 552, 58 N. E. 709; Lott v. State, 24 Tex. App. 723, 14 S. W. 277; Cunningham v. State, 27 Tex. App. 479, 11 S. W. 485; Hill v. State, 57 Wis. 377, 15 N. W. 445. So, where one takes possession of property while he is so drunk as not to know what he is doing, and afterward, when he comes to, he forms the felonious intent to steal, it is not larceny: Cady v. State, 39 Tex. Cr. Rep. 236, 45 S. W. 568.

What appears to be a different holding is found in State v. Davenport, 38 S. C. 348, 17 S. E. 37, where it was decided that the crime of larceny becomes complete where goods of another are carried away without felonious intent, but afterward feloniously appropriated. To sustain this doctrine the court cites Richards v. Commonwealth, 13 Gratt. 803, which was a case where the thief had rightfully acquired the mere custody of goods; hence, it was immaterial that the intent to steal did not exist at the time possession was obtained. This South Carolina case also quotes from 12 American and English Encyclopedia of Law, page 772, where the subject under discussion was the obtaining possession by fraud or false pretenses, and it does not appear that there was an attempt to state a rule other than where fraud existed in procuring the possession of the property. Hence, if this South Carolina case lays down the broad doctrine that a felonious intent need not exist at the time the goods are taken, it has no judicial support outside of decisions based upon statutes.

The question whether when the possession of property is obtained by a pretext, fraud, or false pretenses, the felonious intent to steal must exist at that moment has apparently not been very satisfactorily settled by the authorities. In State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, the court clearly lays down the rule that if a person, without any present intention of stealing it, obtains possession of personal property fraudulently, a subsequent conversion of the property with felonious intent will be larceny. A similar doctrine is found in Commonwealth v. White, 11 Cush. 483, and Beatty v. State, 61 Miss. 18. And it may reasonably be inferred from some Texas cases that in cases of fraud or false pretext, the intent to steal may be formed after possession has been obtained: Hernandez v. State, 20 Tex. App. 151; Morrison v. State, 17 Tex. App. 34, 50 Am. Rep. 120. And see, also, State v. Lindley, 13 S. Dak. 248, 83 N. W. 257.

On the other hand, there are well-considered cases holding that where the possession of property is obtained fraudulently, the felonious intent must exist at the time possession is obtained: Blunt v. Commonwealth, 4 Leigh, 689, 26 Am. Dec. 341; State v. MacRae, 111 N. C. 665, 16 S. E. 173; People v. Lawrence, 137 N. Y. 517, 33 N. E. 547, affirming People v. Sumner, 33 App. Div. 388, 53 N. Y.

Supp. 817; People v. Campbell, 127 Cal. 278, 59 Pac. 593; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093. These cases would seem to establish the better rule, for while the fraud or false pretense will nullify the owner's consent and render the taking a trespass, yet it does not supply the necessary intent, without which the crime is not complete, and which must generally exist when the property is taken. We have already seen that in the case of delivering property by mistake, the better rule is that the intent to steal must exist at the time the possession is acquired.

As just intimated, in cases where a person has merely the custody of property and not its real possession, the intent to steal need not exist at the time the property comes into his hands. In such a case, if the intent is formed at the time the property is fraudulently appropriated it is sufficient, and the crime is complete: Holbrook v. State, 107 Ala. 154, 54 Am. St. Rep. 65, 18 South. 109; People v. Phelps, 49 How. Pr. 437. The usual case when such a situation arises is when a servant converts his master's property: People v. Call, 1 Denio, 120, 43 Am. Dec. 655; State v. Schingen, 20 Wis. 74.

By statute, the intent may be shown to exist either at the time possession was acquired, or at any time during the continuance of the possession: Davis v. State, 54 Neb. 177, 74 N. W. 599.

c. **In Case of Finding Lost Property.**—In order to make one guilty of larceny in appropriating lost property which he has found, he must have a felonious intent to steal: Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; State v. Hayes, 98 Iowa, 619, 60 Am. St. Rep. 219, 67 N. W. 673; Commonwealth v. Titus, 116 Mass. 42, 17 Am. Rep. 138; State v. Conway, 18 Mo. 321; State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Brooks v. State, 35 Ohio St. 46; Stepp v. State, 31 Tex. Cr. Rep. 349, 20 S. W. 753. And this felonious intent must exist at the time he first takes the goods into his possession: Commonwealth v. Titus, 116 Mass. 42, 17 Am. Rep. 138; Griggs v. State, 58 Ala. 425, 29 Am. Rep. 762; Weaver v. State, 77 Ala. 26; Beckham v. State, 100 Ala. 15, 14 South. 859; Starck v. State, 63 Ind. 285, 30 Am. Rep. 214; Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790; Rhodes v. State, 11 Tex. App. 563. If the intent to steal is not formed until afterward, the offense is not larceny: State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526; Ransom v. State, 22 Conn. 153; People v. Anderson, 14 Johns. 294, 7 Am. Dec. 462. In Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790, however, where the defendant purchased a trunk, and later discovered goods in it which he appropriated, it was held that the larcenous intent need not be formed at the time of the delivery of the trunk, if it was formed at the time of the discovery of the goods. This was clearly correct.

So, in the appropriation of an estray, the finder must have the intent to steal at the time he takes it into his possession: Starck v.

State, 63 Ind. 285, 30 Am. Rep. 214; Lamb v. State, 40 Neb. 312, 58 N. W. 963; McCarty v. State, 36 Tex. Cr. Rep. 135, 35 S. W. 994. Hence, the taking of a stray animal openly, in the daytime, under the belief that it had been abandoned, is not larceny: Debbs v. State, 43 Tex. 650; Gosler v. State (Tex. Cr. App.), 56 S. W. 51. And see Johnson v. State, 36 Tex. 375.

It is not larceny to appropriate lost goods found in the highway, where there are no marks on it by which the owner can be ascertained: Tyler v. People, 1 Ill. 293, 12 Am. Dec. 176; Lane v. People, 10 Ill. 305; for usually there is no felonious intent if there is no means of ascertaining the owner. But if the owner is not known and cannot be ascertained, the finder is not guilty of larceny, although he took the goods with the felonious intent of appropriating them: State v. Conway, 18 Mo. 321. And see Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182.

d. Claim of Right.—Where one in good faith takes the property of another, honestly believing it to be his own or that he has a right to its possession, he is not guilty of larceny, for there is no criminal intent: Baker v. State, 17 Fla. 406; Higginbotham v. State (Fla.) 29 South. 410; People v. Devine, 95 Cal. 227, 30 Pac. 378; State v. Bond, 8 Iowa, 540; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269; Commonwealth v. Stebbins, 8 Gray, 492; Lewis v. State, 29 Tex. App. 105, 14 S. W. 1008; Dismuke v. State (Tex. Cr. App.), 20 S. W. 562; Bullard v. State, 41 Tex. Cr. Rep. 225, 53 S. W. 637; Neely v. State, 8 Tex. App. 64. And the merits of such a defense are not contingent upon the care or prudence the accused exercised to identify the property as his own, if he honestly thought it was his own: Neely v. State, 8 Tex. App. 64.

One who takes property under the belief that he is a part owner is not guilty of larceny: Phelps v. People, 55 Ill. 334. Nor if he took it under the belief that his principal owned it: People v. Slayton, 123 Mich. 397, 81 Am. St. Rep. 211, 82 N. W. 205. Nor where a mortgagor retakes his property upon payment of his debt: Von Senden v. State (Tex. Cr. App.), 45 S. W. 725. Nor where he sold property believed to be his own: Black v. State, 38 Tex. Cr. Rep. 58, 41 S. W. 606.

Taking property under a fair and honest claim of right is not larceny: Morningstar v. State, 55 Ala. 148; Causey v. State, 79 Ga. 564, 11 Am. St. Rep. 447, 5 S. E. 121; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269; Kay v. State, 40 Tex. 29; Smith v. State, 42 Tex. 444; Lawrence v. State, 11 Tex. App. 306. A fraudulent intent is not to be inferred where the act is done under color of right without concealment: State v. Deal, 64 N. C. 270; Harris v. State, 17 Tex. App. 177. A mere impression that the taker had a claim or property in the goods is not the equivalent of an honest belief, and does not negative a criminal intent: Morrisette v. State, 77 Ala. 71. But a mere color of right or excuse will negative a felonious intent: State v. Ravescroft, 62 Mo. App. 109. So, where the defendant

gave her father a cow in consideration that he would support her children while she was absent from the state, and the defendant never went out of the state, but remained and supported her children herself, the taking of the cow from her father's possession without his consent is not larceny: Ross v. Commonwealth, 14 Ky. Law Rep. 259, 20 S. W. 214. So, the selling of another's property under the belief that it is intrusted to him for that purpose is not larceny: State v. Barrackmore, 47 Iowa, 684. Neither is the retaking of exempt property sold under execution, where the party acts under an attorney's advice, and discloses the character of his claim fully to the vendee: People v. Schultz, 71 Mich. 315, 38 N. W. 868. Nor the taking of property by a lessor and selling it, where he is so advised by an attorney: Buchanan v. State (Miss., Feb. 1889), 5 South. 617. But the removal of one's property secretly from the possession of one who has a lien on it, which is done against the advice of his attorney, is larceny: People v. Long, 50 Mich. 249, 15 N. W. 105.

If the property is taken under an honest claim of right, it is not larceny, although such claim proves not to be good: Commonwealth v. Stebbins, 8 Gray, 492; Phelps v. People, 55 Ill. 334; and it turns out that he is not the owner and has no right to the property: Lee v. State, 102 Ga. 221, 29 S. E. 264; Lawrence v. State (Tex. Cr. App.), 30 S. W. 668. The fact that the taker is mistaken in the genuineness of his claim is immaterial: State v. Homes, 17 Mo. 379, 57 Am. Dec. 269; Donahoe v. State, 23 Tex. App. 457, 5 S. W. 245. So a purchase from one who is mistakenly supposed to own the property cannot be larceny: Morningstar v. State, 59 Ala. 30. Or a taking from one who is supposed to be the duly authorized agent of the owner: Heskew v. State, 18 Tex. App. 275. Or where the prosecutor's title is brought into doubt at all: Evans v. State, 15 Tex. App. 31. But where one uses an authority given him by another to take property as a subterfuge for taking a third person's property, knowing it to be such, it is larceny: High v. State (Tex. Cr. App.), 24 S. W. 284.

e. Character of Intent.

1. To Convert the Property.

A. Lucri Causa.—Especially among the earlier cases there was a tendency to hold that in order to constitute larceny, the taking must be done with an intent to convert to the taker's own use. Or, in other words, the taking must be lucri causa—that is, for the sake of gain. And hence, if there was no intent to benefit the taker, the offense was not larceny: See State v. Hawkins, 8 Port. 461, 33 Am. Dec. 294; United States v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009; State v. Conway, 18 Mo. 321; Witt v. State, 9 Mo. 671; People v. Woodward, 31 Hun, 57; Alexander v. State, 12 Tex. 540. In one of these cases, however (United States v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009), it should be noticed that the taking was

done neither with the intent to benefit the taker or of injuring the owner or depriving the owner of the property. The taking was of muskets, which the defendant carried away with the sole intent of preventing the use of them upon himself or his associates. It was correctly held that no larceny was committed. It is to be noted, further, that in Alabama and Texas, at least, this rule has been reversed and it is not necessary that the thief should intend to convert the property to his own use: Williams v. State, 52 Ala. 411; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670. And the rule now prevails very generally that the conversion may be without any anticipated benefit to the thief: Keely v. State, 14 Ind. 36. The taker need not have intended to apropriate the property to his own use. If the intent be fraudulent, it is not necessary that it should be lucri causa: People v. Juarez, 28 Cal. 380; State v. Slingerland, 19 Nev. 135, 7 Pac. 280; Hamilton v. State, 35 Miss. 214; Warden v. State, 60 Miss. 638; Delk v. State, 64 Miss. 77, 60 Am. Rep. 46, 1 South. 9; State v. Caddle, 35 W. Va. 73, 12 S. E. 1098; Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782; Best v. State, 155 Ind. 46, 57 N. E. 534. It is only necessary that the taking be fraudulent: Delk v. State, 64 Miss. 77, 60 Am. Rep. 46, 1 South. 9. If the property is taken with the felonious intent to convert it to the use of a person other than the owner, it is larceny: State v. Wellman, 34 Minn. 221, 25 N. W. 395.

B. To Deprive Owner of Property.—Outside of perhaps a few jurisdictions, the authorities are very generally agreed that if the accused takes the property with the intent of permanently depriving the owner thereof, and without an intention to return the same, it is a sufficient felonious intent to render him guilty of larceny: State v. Slingerland, 19 Nev. 135, 7 Pac. 280; Keely v. State, 14 Ind. 36; Fort v. State, 82 Ala. 50, 2 South. 477; Hamilton v. State, 35 Miss. 214; Warden v. State, 60 Miss. 638; People v. Juarez, 28 Cal. 380; State v. Caddle, 35 W. Va. 73, 12 S. E. 1098. An intent to convert to any person's use is larceny: State v. Wellman, 34 Minn. 221, 25 N. W. 395.

There must be an intent to wholly and permanently deprive the owner of his property: State v. South, 28 N. J. L. 28, 75 Am. Dec. 250. The mere taking of property for a temporary purpose, to deprive the owner of it only temporarily, is not larceny: State v. South, 28 N. J. L. 28, 75 Am. Dec. 250; Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782. So, where the taker intends to restore the property to its owner, he does not commit larceny: Gooch v. State, 60 Ark. 5, 28 S. W. 510.

2. To Claim Reward.—If the property of another is taken with the intent of retaining it until he is paid a reward for its restoration to its owner, and, in the event of not receiving such a reward, of not returning it at all, the taking is larceny: Dunn v. State, 34 Tex. Cr. Rep. 257, 58 Am. St. Rep. 714, 30 S. W. 227. The thief

need not intend to deprive the owner of the entire property; it is sufficient if he intends to deprive him of a part of it or a part interest in it. So, the taking of property to hold until a reward is offered, and for the purpose of obtaining the reward, is larceny: Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506. And the taking of a horse with the intent to conceal it either until the owner shall offer a reward and then to return it and claim the reward, or until the owner may be induced to sell it for less than its value, is larceny: Commonwealth v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

3. To Return or Account for Property.—Taking property with the intent to return it is not generally larceny. Hence, to take the bicycle of another temporarily for revenge, with intent to return it, is not larceny, but only a trespass: People v. Brown, 105 Cal. 66, 38 Pac. 518. So, a hostler does not commit larceny by taking a horse only to use and return: State v. Self, 1 Bay, 242. So of anyone who takes another's horse merely for a temporary purpose: McDaniel v. State, 33 Tex. 419. It is not larceny to take charge of a drunken man's property to keep it safely for him: State v. Gilmer, 97 N. C. 429, 1 S. E. 491. To take property from one who is indebted to the taker in a sum much larger than the value of the article, with the intent to account for the same on a settlement, is not larceny: Young v. State, 37 Tex. Cr. Rep. 457, 36 S. W. 272. So the open taking of property, intending to apply it in payment of wages due the taker from the owner is not necessarily larceny: Johnson v. State, 73 Ala. 523. It is evidence from which a jury might find that there was no intent to steal: Johnson v. State, 73 Ala. 523. But the law does not recognize such a mode of collecting debts, and it is for the jury to determine whether the taker is guilty of larceny under such circumstances: Butler v. State, 8 Tex. App. 403. In Commonwealth v. Stebbins, 8 Gray, 492, where the defendant took money with the intent to appropriate it to the payment of a note due him, a conviction for larceny was held proper. The taking of a saddle and leaving more than enough money to pay for it is not larceny: Beckham v. State (Tex. Cr. App.), 22 S. W. 411. And taking refreshments at a saloon and returning the next day to pay for them is not sufficient evidence to show a criminal intent: Mason v. State, 32 Ark. 238.

4. To Use and Abandon Property.—To take another's horse, without any intention of converting him to the taker's use or to permanently deprive the owner of him, but merely to ride for some miles and then abandon him, is a trespass, but not larceny: Dove v. State, 37 Ark. 261. So is the taking of a horse to ride to catch a train, and then turning him loose: Lucas v. State, 33 Tex. Cr. Rep. 290, 26 S. W. 213. And the taking and using a hand-car and then leaving it beside the railroad track: State v. Ryan, 12 Nev. 401, 28 Am. Rep. 802. So a servant who takes a horse, when he is running away, merely to facilitate his escape, and who leaves him

at a livery-stable, having no intention to deprive the owner of his property, is not guilty of larceny: State v. York, 5 Harr. 493.

5. To Injure or Destroy Property.—The taking of property with the intent to injure or destroy it is larceny: Warden v. State, 60 Miss. 638; Delk v. State, 64 Miss. 77, 60 Am. Rep. 46, 1 South. 9; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Stegall v. State, 32 Tex. Cr. Rep. 100, 40 Am. St. Rep. 761, 22 S. W. 146. And this is so because there exists the intent to deprive the owner of the whole or a part of his property: Delk v. State, 64 Miss. 77, 60 Am. Rep. 46, 1 South. 9.

ANGLO-AMERICAN PROVISION COMPANY v. DAVIS PROVISION COMPANY.

[169 N. Y. 506, 62 N. E. 587.]

A JUDGMENT, AS A DEBT OF RECORD, IS A CONTRACT OBLIGATION of the highest nature. (p. 600.)

A JUDGMENT IS NOT A CONTRACT in the sense of any engagement of the parties with each other, since the element of mutuality is wanting. (pp. 609, 610.)

FOREIGN CORPORATIONS.—UNDER THE NEW YORK CODE, AN ACTION cannot be maintained between two foreign corporations unless the cause of action arose within that state. (p. 610.)

A STATUTE IS TO BE GIVEN THAT MEANING which the ordinary meaning of its language warrants. (p. 610.)

CONSTITUTIONAL LAW—FOREIGN CORPORATIONS.—A STATE HAS POWER TO PRESCRIBE, arbitrarily or from policy, limitations and conditions upon the exercise by foreign corporations of corporate rights within the state, whether upon the right to do business or upon the right to sue in the state courts. (p. 610.)

A FOREIGN CORPORATION IS NOT A CITIZEN OF THE STATE IN THE CONSTITUTIONAL SENSE; it has no extraterritorial existence, and what rights it may exercise in other jurisdictions are permitted upon the principle of comity. (p. 611.)

THE PROVISION OF THE UNITED STATES CONSTITUTION THAT FULL FAITH AND CREDIT shall be given to the judicial proceedings of other states does not make the judgments of other states domestic judgments to all intents and purposes, but only gives a general validity, faith, and credit to them as evidence. (p. 613.)

A JUDGMENT RENDERED IN A FOREIGN JURISDICTION is not a cause of action which arose within the state within the meaning of a statute prohibiting actions between foreign corporations unless the cause of action arose within the state. (p.613.)

FOREIGN CORPORATIONS.—IT IS NOT AN UNREASONABLE EXERCISE OF POWER FOR A STATE TO RESTRICT LITIGATION in its courts, between foreign corporations, to causes of local origin. (p. 613.)

Henry Wilson Bridges, for the appellant.

Frank E. Smith, for the respondent.

508 GRAY, J. The plaintiff and the defendant are foreign corporations, organized under the laws of the state of Illinois, and the action is brought upon a judgment, which is alleged in the complaint to have been recovered against the defendant in a court of general jurisdiction within that state. The cause of action, however, upon which the judgment was rendered, is not set forth. The defendant demurred to the complaint, specifying, as grounds, a want of jurisdiction in the court, as to the person of the defendant and as to the subject matter, and that the complaint did not state facts sufficient to constitute 509 a cause of action. The demurrer has been sustained below, and the complaint was dismissed.

Upon the appeal, which the plaintiff now takes to this court from the judgment of dismissal, we have presented questions of the construction which is to be given to the provisions of section 1780 of our Code of Civil Procedure, and of how far its provisions are affected, or controlled, by section 1 of article 4 of the constitution of the United States.

Section 1780 provides that "an action against a foreign corporation may be maintained by another foreign corporation, ... in one of the following cases only: 3. Where the cause of action arose within the state."

The demurrer admits the recovery of a valid judgment, and I shall assume that it was upon a cause of action generally valid. The questions are both interesting and important; but I think that the legal principles, which should guide the decision, are well settled.

The appellant's contention, in effect, is that the cause of action set forth in the complaint arose within this state, because an action on a foreign judgment is an action on a contract, which is to be performed in this state, as everywhere within the United States, where the judgment debtor is called upon to pay it. It is somewhat difficult to appreciate the force of the reasoning which resolves a judgment that has been rendered between the parties within a foreign jurisdiction into a cause of action that "arose within the state." Doubtless, a judgment, as a debt of record, is a contract obligation of the highest nature. The cause of action has become merged, and the law implies the obligation and the promise of the defendant to pay; but it is not a contract in the sense of any engagement

of the parties with each other. The element of mutuality is wanting; for judicium redditur in invitum: Bidleson v. Whytel, 3 Burr. 1545; McCoun v. New York Cent. etc. R. R. Co., 50 N. Y. 176; Gutta Percha etc. Mfg. Co. v. Mayor etc. of Houston, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402. We may concede that an action on a foreign judgment is an action ex contractu; but that there is, within the meaning of the [510] statute, a cause of action which arose within the state, permits of grave doubt and puts a severe strain upon what seems to be plain language. If a judgment is a new debt (Freeman on Judgments, sec. 217), it was created, and therefore, as it seems to me, arose, where the judgment was had. But if we admit that the failure to pay a judgment is a breach of the defendant's obligation, which warrants the plaintiff in enforcing it by an action wherever the defendant may be reached by process, that general right may, nevertheless, be subjected to limitations, when sought to be exercised in other jurisdictions than that in which the plaintiff is domiciled, such as appear to have been imposed by our statute. The code prescribes that, when an action is between two foreign corporations, the cause of action must be one which arose within the state, and a judgment recovered in the foreign jurisdiction is not such by any necessary implication. A statute is to be given that meaning which the ordinary reading of its language warrants, and, thus read, the cause of action mentioned in section 1780 must be one local in its nature, with reference to the state. The code is not dealing with legal fictions: McCoun v. New York Cent. etc. R. R. Co., 50 N. Y. 176. I am of the opinion that a foreign judgment, which has failed of enforcement in the jurisdiction where rendered, cannot be regarded, when sued upon within the state, as included within the class described by this section; however, in legal contemplation, it may be regarded as an unperformed obligation of the judgment debtor. Authorities seem hardly necessary in support of the proposition; but the principle appears in the cases to which we have been referred: Barnes v. Kenyon, 2 Johns. Cas. 381; Thelwall v. Yelverton, 16 Com. B., N. S., 813; and see Pigott on Foreign Judgments, ed. 1884, p. 233.

As to the power of the state to prescribe, arbitrarily, or from policy, limitations and conditions upon the exercise by foreign corporations of corporate rights, I suppose there to be no doubt, whether they be upon the right to do business here, or upon the right to sue in our courts: People v. Fire Assn. of

Philadelphia, 92 N. Y. 311, 324, 44 Am. Rep. 380; Bank of Augusta [511] v. Earle, 13 Pet. 519, 590; Paul v. Virginia, 8 Wall. 168, 181; Pembina Min. Co. v. Pennsylvania, 125 U. S. 181, 187, 8 Sup. Ct. Rep. 737; Waters etc. Oil Co. v. Texas, 177 U. S. 28, 45, 20 Sup. Ct. Rep. 518. Within each state, the people exercise all the powers of government not granted to the general government, nor prohibited by the federal constitution: Const., 10th art. of Amendments. They are prescribed in the constitution of the state, the instrument which furnishes the rules of action and measures the powers of the agents of government designated therein, and they are exercised in the laws, which are promulgated by the law-making body. A corporation could not claim the benefit of those provisions of the federal constitution, which confer upon the citizens of each state a general citizenship, and secure to them in other states all the privileges and immunities to which the citizens would there be entitled, under the constitution and laws of the state, under like circumstances: U. S. Const., sec. 2, art. 4, and Amendment 14. A corporation, as an artificial person, exists only by force of the law which created it. It has no extraterritorial existence, and what rights it may exercise in other jurisdictions are permitted upon the principle of comity. It is not a citizen of the state in the constitutional sense; Story on the Constitution, sec. 1695; Pembina Min. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. Rep. 737. In Paul v. Virginia, 8 Wall. 168, this question was very fully discussed, and it was said that "the corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 13 Pet. 519: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; [512] they may restrict its business in particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

It is strenuously insisted, however, that the action is maintainable, within the meaning and the operation of section 1 of article 4 of the constitution of the United States, which reads that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." A general view of the constitutional provision would make its purpose appear to be to introduce uniformity in the rules of proof, to prescribe the effect of such proof or authentication, and to attribute to foreign judgments "positive and absolute verity, so that they cannot be contradicted or the truth of them denied, any more than in the state where they originated": Story on the Constitution, secs. 1310, 1312. The effect which the appellant would have the courts give to these provisions is to invest the foreign judgment with such ubiquitous character and force as, upon its being brought within the state, to make it mandatory upon its courts to entertain an action for its enforcement. That this is the true construction of the clause I doubt, and my doubt appears to be supported by authority. I refer to what was said about the "full faith and credit" clause of the federal constitution in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370. "Those provisions," it was said, "establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one state in the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments [513] recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the case and of the parties: Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. Rep. 242. In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley, speaking for this court: 'The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments

of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence.' A judgment recovered in one state, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it into another state the efficiency of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit': M'Elmoyle v. Cohen, 13 Pet. 312, 325." See, also, Huntington v. Attrill, 146 U. S. 657, 684, 13 Sup. Ct. Rep. 224; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. Rep. 555. I do not think that this clause of the federal constitution has the virtue attributed to it by the appellant; or that the code provision in question is in conflict with it.

From a consideration of the authorities, the conclusion must result that the limitation imposed by section 1780 of the code, upon the jurisdiction of the courts, in the respect discussed, was a valid exercise of the power of the state, and that, when the cause of action is the enforcement of a judgment rendered in a foreign jurisdiction, it is not one which, in the contemplation of the statute, arose within the state. Nor can it be said to be an unreasonable exercise of power for the state to restrict litigation in its courts to causes of local origin, where a foreign corporation is sued by a foreign corporation: Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315, 323, 19 N. E. 625.

The conclusion is reached without considering an aspect of the question, which is not, possibly, without importance, and that [514] is, that it does not appear from the complaint that the cause of action, upon which the plaintiff recovered its judgment, was one which it might constitutionally sue upon here: Huntington v. Attrill, 146 U. S. 657, 685, 13 Sup. Ct. Rep. 224.

The judgment should be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Cullen and Werner, JJ., concur.

Judgment affirmed.

Foreign Corporations do Business within a state not by right, but by comity. A state may admit them on conditions, or discriminate in the privileges it may grant them, or exclude them altogether: State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449.

84 N. W. 413; State v. North American Land etc. Co., 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; State v. Schlitz Brew. Co., 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; Scottish etc. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; Cravens v. New York Life Ins. Co., 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519.

Corporations are not Citizens within the provision of the federal constitution that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States: Hawley v. Hord, 72 Vt. 122, 82 Am. St. Rep. 922, and cases cited in the cross-reference note thereto, 47 Atl. 401.

On the Jurisdiction Over Foreign Corporations, see the monographic note to Abbeville etc. Co. v. Western etc. Co., 85 Am. St. Rep. 905-938.

Judgments are Classified as Contracts with reference to remedies upon them: Wattles v. Wayne Circuit Judge, 117 Mich. 662, 72 Am. St. Rep. 590, 76 N. W. 115; Meyer v. Brooks, 29 Or. 203, 54 Am. St. Rep. 790, 44 Pac. 281; though they are not contracts for all purposes and under all circumstances: Gutta Percha etc. Mfg. Co. v. Mayor, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402.

UNION NATIONAL BANK v. CHAPMAN.

[169 N. Y. 538, 62 N. E. 672.]

CONFLICT OF LAWS.—ALL MATTERS BEARING UPON THE EXECUTION, THE INTERPRETATION AND THE VALIDITY OF CONTRACTS, including the capacity of the parties to contract, are determined by the law of the place where the contract is made. (pp. 616, 617.)

CONFLICT OF LAWS.—ALL MATTERS CONNECTED WITH THE PERFORMANCE OF A CONTRACT, including presentation, notice, and demand, are regulated by the law of the place where the contract, by its terms, is to be performed. (p. 617.)

CONFLICT OF LAWS.—ALL MATTERS RESPECTING THE REMEDY to be pursued, including the bringing of suits and the service of process, depend upon the law of the place where the action is brought. (p. 617.)

CONFLICT OF LAWS.—THE CAPACITY OF A MARRIED WOMAN TO CONTRACT must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of its execution, clearly understood and intended that it should be governed by the laws of another state. (p. 618.)

David B. Hill and O. P. Hurd, for the appellant.

John A. Barhite, for the respondent.

541 HAIGHT, J. This action was brought upon a promissory note made at Tuscumbia, in the state of Alabama, by the

defendants, Chapman, Reynolds & Co., a copartnership engaged in business at that place, in the building of a lock in the Tennessee river for the government of the United States, of which note the following is a copy:

"$5,000. Tuscumbia, Alabama, May 1st, 1894.

"Six months after date we promise to pay to the order of E. P. Reynolds, Jr., five thousand and no 100ths dollars, value received, with interest at eight per cent per annum from date, payable at Union National Bank, Chicago, Illinois.

"CHAPMAN, REYNOLDS & CO.
"W. P. CHAPMAN.
"ELIZABETH J. CHAPMAN.
"ELLA HOWARD.
"C. W. HOWARD."

The trial court has found as facts that the defendant Elizabeth J. Chapman was the wife of William P. Chapman, who was a member of the firm; that she signed the note at the request of her husband as surety for the firm, and that while it was the intention of the firm that the note should be negotiated and discounted in the state of Illinois, she did not know of such intention except from what appeared on the face of the note; that she signed the note for the purpose of raising money for the firm to enable it to continue its work upon the government contract in Alabama, and after the note was executed it was delivered to Reynolds, the payee therein named, who took it to the plaintiff's bank in Chicago, Illinois, [542] indorsed it and delivered it to the bank for the purpose of securing loans already made to the firm, and for the purpose of procuring additional loans.

The defense interposed by the defendant Elizabeth J. Chapman was that she had no capacity to make the contract in question under section 2349 of the code of the state of Alabama, which provides that "the wife shall not, directly or indirectly become surety for her husband," and it was, therefore, invalid and of no binding force against her.

On behalf of the plaintiff it is contended that the note had no legal inception until it was discounted by the plaintiff's bank in Illinois, and that it then became a valid contract of that state, and under its laws the wife was not disqualified from becoming surety for her husband. The question thus presented is as to whether this was an Alabama or an Illinois contract.

As we have seen, the note was drawn, signed, and delivered to the payee at Tuscumbia, Alabama, and that Mrs. Chapman signed as surety for her husband. She did not authorize it to be discounted in Illinois, or know that the members of the firm intended to have it negotiated there. She only knew that it was payable at the plaintiff's bank in that state. It is true the note did not have a valid inception in such a sense as to create a liability on the part of the makers until it was discounted and passed over to the bank, but this does not necessarily make it an Illinois contract, so far as the surety is concerned. Mrs. Chapman's contract to become surety was complete when the instrument was signed and delivered to the payee. It was then a contract beyond her recall, upon which she in the future might become liable when negotiated by the payee, if otherwise valid, and the place of the negotiation could not, under the circumstances, in any manner change the force or effect of her contract. One of the essential elements in a contract is the meeting of the minds of the contracting parties upon the matter which is the subject of the contract. In this contract Mrs. Chapman agreed with the payee of the note that she would become surety for her husband to the [543] amount thereof, and this agreement was made in the state of Alabama. She did not agree that it should be negotiated in Illinois and made an Illinois contract. Her mind did not meet the intention of the payee upon that subject, and she cannot, therefore, be held to have agreed that it should become a contract of that state. She knew, by the terms of the instrument, that it was payable at the plaintiff's bank, but this did not advise her that it was intended to discount it there or to constitute it a contract of that state. It appears from the evidence that the firm kept its accounts with and made its deposits in the plaintiff's bank, and she might well have assumed that it was made payable there for the convenience of the firm.

We have had occasion to examine many cases bearing upon the question under consideration. It may not be profitable to here indulge in an extended discussion of the authorities, for we have found none that are exactly in point. We shall, therefore, extract from them some general principles, which appear to be settled beyond controversy, and apply them to the question under consideration.

1. All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of

the parties to contract, are determined by the law of the place where the contract is made; 2. All matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed; 3. All matters respecting the remedy to be pursued, including the bringing of suits and the service of process, depend upon the law of the place where the action is brought.

In the case of Scudder v. Union Nat. Bank, 91 U. S. 406, a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the St. Louis firm, then present in Chicago. Under the law of Missouri acceptances were required to be in writing, but under the law of Illinois a parol acceptance was valid. The bill of exchange, as we have seen, was drawn in Chicago, Illinois, 644 and, therefore, all matters pertaining to its execution, interpretation, and validity had to be determined by the laws of that state. It was made payable in St. Louis, Missouri, and, ordinarily, the laws of that state would control with reference to acceptance and performance, but a member of the firm in that state was present in Chicago and he there accepted the bill of exchange without waiting for it to be sent on to St. Louis to his firm in that city. It was, therefore, held to be an Illinois acceptance.

In the case of Voigt v. Brown, 42 Hun, 394, the husband and wife resided in the state of New York; the wife here authorized her husband to sign her name to an accommodation note. He then went into Connecticut and there executed a note payable to the order of the firm of which he was a partner and signed her name thereto. He then took the note to New York and had it discounted by the plaintiffs and received the money. Under the laws of Connecticut a married woman could not contract except for the benefit of herself, her family or her separate or joint estate. Under the laws of New York her contract was valid. It was held to be a New York contract. The learned appellate division cites this case as supporting their contention, but to our minds it widely differs from that which we have under consideration. In that case the wife, as we have seen, resided in this state and remained in this state. The authority of her husband to sign her name to the note was given here. When he, therefore, as her agent, drew the note and signed her name thereto, he acted upon authority derived in this state, and the paper be-

came of the same force and effect as if the wife had actually signed it here. It was taken to the city of New York and there negotiated. We thus have it drawn as a New York contract and negotiated as a New York contract, and it evidently was so understood by the parties.

In the case of Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, a wife guaranteed the payment by her husband of five hundred dollars to one Pratt of Portland, Maine. The guaranty was in writing and was dated at Portland, January 29, 1870. She, [545] however, actually signed the paper in Massachusetts, but she sent it to Pratt at Portland and caused it to be delivered to him there. Acting upon it he delivered goods to her husband which he then purchased. The guaranty was valid under the laws of Maine but void under the laws of Massachusetts. It was held that the contract was governed by the laws of Maine. In this case it will be observed that the guaranty not only purports to have been executed in Maine, but that the wife caused the instrument to be sent to Maine and there delivered to the plaintiff. She, therefore, knew and understood that the contract was to have its inception there, and, consequently, must have intended it to be controlled by the laws of that state.

In line with this is the recent case of Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490, affirmed in this court, 158 N. Y. 688, 53 N. E. 1125, in which it was expressly held that the contract must be construed and determined under the law of the state where it was executed, unless it could fairly be said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state.

Applying these principles to the question under consideration, it seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of the execution of the instrument, clearly understood and intended that it should be governed by the laws of another state. Such an intention or understanding is not manifest in this case; instead thereof, it is found that she did not know where the paper was to be discounted.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Vann, J., with Whom Concurred Bartlett, J., Dissented, on the ground that the contract of the married woman was an Illinois contract, and should be governed by the laws of that state. The judge presented the matter very clearly. The married woman knew when she signed the contract was an accommodation note, "made to raise money for the use of the firm, and that until negotiated it was without binding force upon anyone. After signing it she intrusted it to the payee, knowing that, in behalf of the firm, he intended to negotiate it somewhere, and that he was at liberty to negotiate it anywhere. When the payee thus received the note signed by her she had made no contract, for the paper had no inception as yet. The contract of a surety rests upon the contract of the principal, and until the latter becomes operative the former is not binding." The judge then proceeds to show that the note was negotiated in Illinois, and did not become a binding contract until that time, and that all that was done in Alabama did not make a contract, and concludes: "As the note was made payable in Illinois, was delivered by Mrs. Chapman with leave to negotiate it anywhere, and it was actually negotiated and had its first inception in that state, the mere fact that it was written in another state where she had a temporary residence only, and where she knew it could not be enforced, and hence could not be honestly used, did not make it a contract of that state nor prevent it from becoming a contract of the state within which she promised to pay it. I think it was an Illinois contract, and should be governed by the laws of that state."

The Validity of a Married Woman's Contract is usually determined by the law of the state where it is made: See the monographic note to Locke v. McPherson, 85 Am. St. Rep. 566, on conflict of laws as affecting the rights and obligations of married women: Thompson v. Taylor, 66 N. J. L. 253, ante, p. 485, 49 Atl. 544.

Conflict of Laws.—The lex loci governs the validity and interpretation of contracts: Woodward v. Brooks, 128 Ill. 222, 15 Am. St. Rep. 104, 20 N. E. 685; Schultz v. Howard, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363; Bartlett v. Collins, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703. But the law of the forum controls the remedies thereon: Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; Woodward v. Brooks, 128 Ill. 222, 15 Am. St. Rep. 104, 20 N. E. 685.

AHRENS v. JONES.

[169 N. Y. 555, 62 N. E. 666.]

TRUSTEE EX MALEFICIO.—WHERE A DEED IS EXECUTED FOR THE PURPOSE OF EFFECTING A DISTRIBUTION of the grantor's property, upon the express promise of the grantee to pay certain sums to others, though no express trust is created, a court of equity may interpose to prevent a wrong, and declare the grantee a trustee ex maleficio for the protection of the grantor's intended beneficiaries. (p. 622.)

TRUSTEE EX MALEFICIO.—WHERE PROPERTY IS CONVEYED UPON THE EXPRESS PROMISE of the grantee to pay certain sums to others, the grantee having no other property, equity will interpose to declare a trust and compel payment to the beneficiaries out of the property conveyed. (p. 624.)

James C. de La Mare, for the appellant.

John R. Halsey, for the respondent.

558 HAIGHT, J. This action was brought to declare and enforce a lien upon real estate. The material facts alleged in the complaint are that one Harry Jones, late of the city of New York, on the twenty-fifth day of February, 1897, being sick and not expecting to live, and being desirous of disposing of his property before he died, conveyed certain premises, specifically described, to his two daughters, and also conveyed certain other premises, also specifically described, to the defendant Clara M. Jones, his wife; that at the time of the execution and delivery of the deed to his wife it was expressly understood and agreed between them that, as a part of the consideration of the same and as a condition upon which the same was executed, the said Clara M. Jones should pay to the plaintiff and to one Price, the grandchildren of said Harry Jones, each the sum of one thousand dollars, which several sums the defendant promised and agreed to pay to each of such grandchildren; that on the twenty-seventh day of May, 1897, Harry Jones died, leaving him surviving his widow, the defendant, two children, Anna H. Ahrens and Rosetta Wiley, and two grandchildren, Harry S. Price and the plaintiff, both under age; that he owned no other real estate, and the execution and delivery of the deeds above set forth were intended by him, and so understood and agreed by the defendant, to be an equitable disposition of his property between his widow, his children and grandchildren, and that the property conveyed to the defendant was of much greater value than the

property conveyed to his two children, and that his widow has no other property; that since his death demand has been made upon the defendant to pay or secure to the plaintiff the sum of one thousand dollars, but that the defendant has refused and neglected to pay or secure the same, and claims that she is under no obligation to fulfill her promise. Judgment is demanded that the sum of one thousand dollars be declared a lien upon the premises conveyed to the defendant, and that the premises be sold by and under the direction of the court, and out of the proceeds the plaintiff be paid the amount due and owing to her.

It is contended on behalf of the respondent: 1. That the 559 grandfather of the plaintiff owed her no duty, was under no obligation to support her, and that none of the consideration for the deed proceeded from her; that there was no privity of contract between her and the defendant, and that the promise of the defendant does not bring her within the scope of the decision in Lawrence v. Fox, 20 N. Y. 268; 2. That there is no trust, express or implied, alleged in favor of the plaintiff; and 3. That the right to a lien for a part of the purchase price is personal to the vendor.

The complaint has been somewhat carelessly prepared, but upon demurrer all of the facts alleged, or that by reasonable and fair intendment may be implied, are deemed admitted, and it remains to be determined whether the plaintiff has any cause of action under the facts so alleged: Coatsworth v. Lehigh Valley R. R. Co., 156 N. Y. 451, 51 N. E. 301.

The complaint, as we have seen, alleges that on the twenty-fifth day of February, 1897, the grantor, being sick and not expecting to live long, and being desirous of disposing of his property before he died, executed the conveyance to the defendant; that upon the delivery of the deed to her it was intended by him, and so understood and agreed by the defendant, to be an equitable disposition of his property between his widow, his two children and his two grandchildren. It is, therefore, apparent that the deed was executed in contemplation of death, for the purpose of effecting a distribution of his property between the persons he deemed to be the proper objects of his bounty. The execution and delivery of the deed, under such circumstances, is analogous to a devise made by will and is largely controlled by the rules of law applicable thereto.

If the contention of the defendant is sound, the plaintiff has no remedy, either at law or in equity. What, then, is the situation in which the defendant places herself? Her husband was sick and expecting to die; he was desirous of disposing of his property among the members of his family. She, in order to induce him to give her a deed of the premises in question and as part of the consideration therefor, agreed with him to deliver to his two granddaughters one thousand 560 dollars each. As soon as he died she refused to carry out her promise, and now insists that she is not liable thereon. She thus obtains the property, and refuses to perform her agreement. This is an attempt to perpetrate a fraud not only upon her husband, who was induced to make the gift to her by reason of her promise, but also upon the plaintiff, who presumably would have been otherwise provided for by her grandfather had it not been for the defendant's promise. It is true there is no express trust created by the deed, or by the promise made by the defendant, but, notwithstanding this, a court of equity is not bereft of power to act for it may interpose to prevent a wrong, and for that purpose it may declare the grantee a trustee ex maleficio for the protection of the grantor's intended beneficiaries. Such a trust does not affect the deed, but acts upon the gift, as it reaches the possession of the grantee, and the foundation for the trust is that equity will then interfere and raise a trust in favor of the persons intended to be benefited in order to prevent a fraud.

In Matter of O'Hara, 95 N. Y. 403, 47 Am. Rep. 53, the testatrix gave to her lawyer, her doctor, and her priest absolutely the bulk of her estate, practically disinheriting her relatives. It appeared, however, that the devise and bequest in its absolute and unconditional form was made upon a promise of the legatees and devisees to apply the property to charitable uses, in accordance with a letter of instructions which she had prepared. Finch, J., in speaking for the court, says: "If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud on the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor, which equity will not endure."

Again, he says: "If, on the ground of fraud, equity, as it has often done, and will always do, fastens a trust ex maleficio upon the [561] fraudulent legatee or devisee for the protection of a named and definite beneficiary, no reason can be given why it should not do the same thing when the fraud attempted assumes a more serious character, because aimed at an evasion of the law, and seeking the shelter of unauthorized purposes."

In the recent case of Amherst College v. Ritch, 151 N. Y. 282, 323, 45 N. E. 876, 887, we had under consideration the will of Daniel B. Fayerweather, in which this question again received careful consideration. Vann, J., in delivering the opinion of the court, says: "If the testator is induced either to make a will, or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him: Williams v. Fitch, 18 N. Y. 546; Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165; Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464. The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made, and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself, as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee ex maleficio, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator [562] and his own promise": See, also, O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Wood v. Rabe, 96 N. Y. 414, 425, 48 Am. Rep. 640; Moyer v. Moyer, 21 Hun, 67; Wheeler v. Reynolds, 66 N. Y. 227; Brown v. Lynch, 1

Paige, 147; Dowd v. Tucker, 41 Conn. 197; De Laurencel v. De Boom, 48 Cal. 581; Browne v. Browne, 1 Har. & J. 430; Church v. Ruland, 64 Pa. St. 442; Towles v. Burton, Rich. Eq. Cas. 146, 24 Am. Dec. 409; McLellan v. McLean, 2 Head, 684; Russell v. Jackson, 10 Hare, 204; Thynn v. Thynn, 1 Vern. 296; Reech v. Kennegal, 1 Ves. Sr. 124; Wallgrave v. Tebbs, 2 Kay & J. 321; McCormick v. Grogan, L. R. 4 Eng. & Ir. App. 82; Fairchild v. Edson, 154 N. Y. 199, 219, 61 Am. St. Rep. 609, 48 N. E. 541.

The claim is now made that no trust was created, for the reason that the defendant agreed to pay the plaintiff a certain sum of money and not to turn over to her any portion of the property described in the deed. The agreement, as we have seen, was to pay to the plaintiff the sum of one thousand dollars, and this promise was made to induce the grantor to deed the premises to the defendant. The grantor was dividing up his property, in contemplation of death, among his wife and children. The premises deeded to the defendant he evidently considered to be more than her just proportion of his estate, and he, therefore, exacted a promise from her to contribute out of such property the amount that he desired to give to his grandchildren. He invested her with the whole title, so that she had the power to mortgage, lease, or sell. She had no other property. This is specifically alleged. It must, therefore, have been intended that the payment should be made out of the property the same as in the Amherst College case. In that case, the estate of the testator had to be converted into money in order to make a distribution among the beneficiaries intended.

The judgment should be reversed and the demurrer overruled, with costs in all the courts, with leave to the defendant to withdraw demurrer and to answer within twenty days upon payment of the costs of the demurrer and of the appeals.

Parker, C. J., Bartlett, Martin, Vann, Cullen, and Werner, JJ., concur.

A Trust ex Maleficio Arises whenever a person acquires the legal title to property by false and fraudulent promises to hold it for certain specified purposes: Goodwin v. McMinn, 193 Pa. St. 646, 74 Am. St. Rep. 703, 44 Atl. 1094; Rollins v. Mitchell, 52 Minn. 41, 38 Am. St. Rep. 519, 52 N. W. 1020; Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, and cases cited in the cross-reference note thereto, 29 N. E. 1116. But it is held in Orth v. Orth, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, that the violation of a parol promise, made by the sole beneficiary under a will, to carry out the wishes of the testator, expressed in a letter to the former, is not such a fraud as creates a trust ex maleficio.

STERNAMAN v. METROPOLITAN LIFE INSURANCE COMPANY.

[170 N. Y. 13, 62 N. E. 763.]

INSURANCE, LIFE—AGREEMENT THAT AN AGENT OF THE INSURER SHALL BE THE AGENT OF THE ASSURED.—IF A MEDICAL EXAMINER is selected and paid by the insurer, who insists upon making such selection for himself, and the assured has nothing to do with such medical examiner except to submit to his examination and answer his questions, a stipulation in the application for insurance that the examiner shall be deemed the agent of the applicant is in contradiction to known facts, and cannot estop a beneficiary from proving that such examiner was the agent of the insurer only, and as such wrote the answers in the application, and, in so doing, did not correctly state the answers in fact made by the applicant. (pp. 629, 630.)

INSURANCE—NEGLIGENCE OF AGENT.—SOUND POLICY PROHIBITS AN INSURER FROM STIPULATING for immunity from the consequences of his own negligence, or, what is the same thing, the negligence of his agent or medical examiner. (p. 630.)

INSURANCE, LIFE—WARRANTY, WHEN NOT A DEFENSE.—A warranty contained in an application for life insurance that the answers of the applicant are true and that they are correctly recorded, cannot relieve the insurer from liability, if, when he issues the policy, he knew, through his medical examiner, that the answers as recorded were not literally true, that the answers as given were not correctly recorded and that this occurred through no fault of the assured. (p. 630.)

AN INSURANCE CORPORATION IS ESTOPPED FROM RELYING ON AN AGREEMENT in an application for life insurance "that no information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person shall be binding on the company, or shall modify or alter the declarations and warranties made therein," if it issues a policy with knowledge of facts not stated in such application. (p. 631.)

INSURANCE, LIFE.—THE MEDICAL EXAMINER IS THE AGENT OF THE INSURER in making an examination and taking down and recording the answers. His knowledge thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which is estopped from taking advantage of what it thus knew and what it had thus done when it issued the policy and accepted the premiums. (p. 632.)

Action to recover upon a policy of insurance upon the life of George H. Sternaman issued by the defendant to the plaintiff as beneficiary. The policy recited that the promise to insure was made in consideration of statements contained in the application, and that all these were referred to and made a part of the contract. Among the warranties contained in the applica-

tion were these: That the answers in the application as thus made to the medical examiner were full, true, and correctly recorded; that no information or statement not contained in the application and in the statements made to the medical examiner, received or acquired at any time by any person, should be binding on the company or modify the declaration and warranties; that the person who wrote in the answers and statements was the agent of the assured, and not of the insurer; and that the latter should not be taken to be responsible for the preparation of the application, or for anything contained therein or omitted therefrom; and that any false, incorrect, or untrue answers, or any suppression or concealment of facts should render the policy void. It was conceded that the answers written in the application and relating to the health of the applicant, the diseases he had been afflicted with, and the physician whom he had consulted were written by the medical examiner of the defendant. The plaintiff sought to prove that the applicant, in fact, made correct answers to all the questions propounded to him, but that the medical examiner had omitted many of such answers as unimportant, and had in other respects not correctly recorded the answers made to him. The evidence so offered was excluded by the trial court, and the plaintiff excepted. The insured died of a disease apparently having no connection with the answers alleged to be false. The jury was directed by the trial judge to render a verdict for the defendant. Such verdict having been accordingly returned, a judgment was entered thereon, which, on appeal, was affirmed by the appellate division, one judge dissenting and one not voting.

Wallace Thayer, for the appellant.

Seward A. Simons, for the respondent.

[18] VANN, J. The decision of this appeal turns substantially upon the following question: When an applicant for life insurance makes truthful answers to all questions asked by the medical examiner, who fails to record them as given and omits an important part, stating that it is unimportant, can the beneficiary show the answers actually given, in order to defeat a forfeiture claimed by the insurer on account of the falsity of the answers as recorded, even if it was agreed in the application that the medical examiner, employed and paid by the [19] insurer only, should not be its agent, but solely the agent of the insured?

The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists and that it does not exist, or provide that one is the agent of the other, and at the same time and with reference to the same subject that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan, in fact void for usury, is not usurious, or that a copartnership, which actually exists between them, does not exist. They cannot by agreement change the laws of nature, or of logic, or create relations physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract.

The parties to the policy in question could agree that the person who filled out part "A" of the application was the agent of the insured and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, because that requires professional skill and experience, and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor appoint a physician to do it, because the insurer very properly insists upon making the selection itself. The medical examiner was selected, employed, and paid by the company. The insured had nothing to do with him, except to submit to an examination by him, as the expert of the company, and to answer the questions asked by him in behalf of the company. This he was forced to do in order to procure [20] insurance, for the company required him to undergo a medical examination by an examiner selected and instructed by itself, before it would act upon his application for a policy. He could neither refuse to be examined nor select the examiner, and he was not responsible if the latter was negligent or unfit for the duty assigned to him. He could not direct or control him, but the company could and did, for it required him to make the examination, fill out part "B" of the application blank and report the facts with his opinion. The insured made no contract with the examiner and was under no obligation to

pay him for his services. The company, however, made a contract with him to do certain work for it and agreed to pay him for the work when done.

As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law, yet it is claimed that as between the insured and the company, the examiner was the agent of the former only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company, or its president, was his agent. It was in contradiction of every act of the parties and of every fact known to either. The law, when applied to the facts, made the physician the agent of the company and not of the insured, and can it be held that, as the insured agreed that the physician was his agent, he became such in spite of the law and the facts? This is not a case of agency of one party for one purpose and of another party for a different purpose, for the physician was employed for a single purpose only, and that was to make a physical examination of the insured, ask him the questions furnished by the company, record his answers, and report the result. They were not the questions of the insured, put to himself, to elicit facts for his use. He knew the facts. He did not need to question himself to find out what he knew, nor to employ an agent for that purpose. The questions were those of the company, carefully prepared for it by skillful [21] hands and furnished to its medical examiner to be asked so that it could learn what the insured knew about himself. It needed the facts for its use, and what was done by its own examiner to get the facts and report them to the company was its work, done for its benefit, and in the course of its business. The answers were not volunteered, but were given in response to questions asked by the company, as much as if, impersonated, it had actually asked them as an individual. Whatever it told Dr. Langley to do for it, in the view of the law, it did itself. "Qui facit per alium, facit per se." It appointed Dr. Langley its agent for the purpose named, and he derived all his authority to act from the company, which could regulate his conduct by its rules and could provide for such security to protect its interests from the consequences of his neglect or default as it saw fit.

Can parties agree that facts, which the law declares establish a certain relation, not only do not establish that relation, but

establish directly the opposite? Can A appoint B his agent for a definite purpose and then agree with C that B is not the agent of A, but is the agent of C for that purpose, there being no agreement whatever between B and C?

An agency is created by contract, express or implied. It "is a legal relation by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority": Mechem on Agency, sec. 1; Story on Agency, sec. 3. "To constitute agency, there must be consent both of principal and of agent": Wharton on Agency, sec. 1. What was the contract between the company and the examiner? The defendant, being a corporation, could act only through agents. Having some work to do in the form of a medical examination, it requested Dr. Langley to do it. It created the relation of agency between him and itself by employing him, paying him, etc. It alone could discharge him, and to it alone was he responsible for disobedience or negligence. It could control [22] his conduct by any reasonable instructions, and hold him liable if he violated them. It prescribed certain questions that he should ask and required him to take down the answers in a blank prepared by itself. It could sue him if he did not do it properly, and he could sue the company if it did not pay him for doing it. Thus we have an agency between the company and the examiner established by mutual agreement, with the right on the one hand to instruct, to discharge, and to hold liable for default, and on the other to compel payment for services rendered. Hence what the examiner did in the course of his employment the company did, and what he knew from discovery while acting for it the company knew.

What was the contract between the insured and the examiner? None whatever. The insured did not employ the examiner, and the examiner did not agree to work for him. Neither was under any legal obligation or liability to the other. The insured could not instruct the doctor, nor discharge him, nor sue him for negligence, and the doctor could not sue the insured for compensation. The relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law.

What was the contract between the insured and the insurer? With the relations above described as existing between the insurer and the examiner in full force, and in the absence of any

legal relation between the examiner and the insured, an attempt was made by the insurer, by an agreement imposed upon the insured, to subvert the relation of its own examiner to itself and establish a relation between him and the insured, without the consent of either given to the other. There was no tripartite contract. While the contract between the doctor and the company was still in existence, the latter agreed with a third party only that that contract did not in fact exist between the two parties who made it, but did exist between two parties who did not make it. This was not possible by any form of words, any more than to make black white, or truth falsehood. We think that the medical [23] examiner was the agent of the defendant in making the examination of the insured, recording his answers and reporting them to the company.

Sound public policy prohibits the company from stipulating for immunity from the consequences of its own negligence, or what is the same thing, the negligence of its agent: Rathbone v. New York Cent. etc. R. R. Co., 140 N. Y. 48, 35 N. E. 418. The manner of conducting the examination was, of necessity, intrusted to the judgment of the medical examiner to a great extent. His judgment might influence him to take down the answers in a general or in a particular way. In exercising his judgment he determined that certain answers were too trivial to be recorded. In making that determination, he was not acting for the insured, but for the company, for it had furnished him with a blank and had invested him with power to take down the answers, and hence with power to decide how they should be taken down. If he was negligent, or failed to do his duty in this regard, the company could not by an agreement, made in advance, cast the burden upon the insured, who did not select or employ him. His negligence was its own negligence, and it could not by contract make it the negligence of the insured, or relieve itself from the legal consequences thereof.

But, it is insisted, the insured warranted that the answers were true, and that they were correctly recorded. When the company issued the policy, however, it knew, through its medical examiner, that the answers as recorded were not literally true; that the answers as given were not correctly recorded, and that this occurred through no fault of the insured. It could not take the money of the insured while he lived and, when he was dead, claim a forfeiture on account of what it knew at the time it made the contract of insurance, for that would be a fraud: Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434;

O'Brien v. Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954; Kenyon v. Knights Templar etc. Assn., 122 N. Y. 247, 25 N. E. 299.

The insured also agreed that "no information or statement [24] not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declarations and warranties made therein." The facts sought to be proved were contained in the oral statements made to the medical examiner, but assuming that recorded statements only were meant, the result would be an agreement that the company might perpetrate a fraud upon the insured by issuing a policy and accepting premiums thereon, knowing all the time that the contract was void, or voidable at its election. The law does not permit this, for it declares that the company is estopped from taking advantage of such a contract, because it would be against equity and opposed to public policy. We adopt, as expressing our own views upon the subject, the following language used by the supreme court of the United States in a case somewhat analogous: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. It is precisely in such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppel, or, as it is sometimes called, estoppel in pais. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance [25] agent who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the

application, the company must be held to stand just as he would if he were the principal. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it": Insurance Co. v. Wilkinson, 13 Wall. 222.

We think it is established by the weight of authority in this state that the medical examiner is the agent of the insurer in making the examination, taking down the answers, and reporting them to the company; that his knowledge, thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which is estopped from taking advantage of what it thus knew and what it had thus done when it issued the policy and accepted the premiums: O'Farrell v. Metropolitan Life Ins. Co., 22 App. Div. 495, 48 N. Y. Supp. 199, 44 App. Div. 554, 60 N. Y. Supp. 945, 168 N. Y. 592, 60 N. E. 1117; O'Brien v. Home Ben. Soc., 117 N. Y. 310, 318, 22 N. E. 954; Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Flynn v. Equitable Life Ins. Co., 78 N. Y. 568, 34 Am. Rep. 561; Whited v. Germania Fire Ins. Co., 76 N. Y. 415, 32 Am. Rep. 330; Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128.

The earlier cases of Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451, and Alexander v. Germania Fire Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76, involved the authority of a fire insurance broker or solicitor only, and were distinguished in Whited v. Germania Fire Ins. Co., 76 N. Y. 419, 420, 32 Am. Rep. 330, where the court said: "If the [28] procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or, if he is so taken, the insurer must be bound by his acts and words when he stands in its place and moves and speaks as one having authority from it, and pro hac vice, at least, he does then rightfully put off his agency for the insured and put on that for the insurer."

In Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309, the intermediary was also a mere broker and not the agent of the company, as distinctly appears on page 15, where the court said: "So far as it appears, Noble had no relations whatever with the defendant other than that he forwarded this paper-writing, which contained statements of the amount of insurance proposed for and of the privileges desired. He certainly appears to have been nothing more than an insurance broker, soliciting insurance business, and when, upon the acceptance of the risk, he received back a policy of the company for the plaintiff, his sole office was simply to deliver it for the company and to collect the premium. That is certainly not enough to constitute him an agent for the company with authority to bind it retroactively or presently in transactions relating to the insurance. Circumstances are wholly wanting from which we may presume the authority of an agent."

In the earlier Grattan case the medical examiner was instructed by the defendant to report the answers to the questions in the certificate in his own handwriting, but he failed to report one of the answers as given by the applicant. In an action on the policy the falsity of the answer, as recorded, was insisted upon as a defense, although the answer as given was absolutely true. The court, referring to the medical examiner, said: "He was, as medical examiner, charged with certain duties by the defendant and was acting in concert with the soliciting agent of the company. On the part of the life insured was entire good faith and truthfulness, and there is no reason to suspect any intentional unfairness on the part of the examiner. The omission was inadvertent. Is the company [27] thereby released from its obligation? Many decisions in this court show that it is not: Mowry v. Rosendale, 74 N. Y. 360, and cases there cited. Within the principles therein recognized as well established, the erroneous answers must be taken as the declaration of the defendant, and in any controversy depending upon it must, between the parties, be taken to be true. In this case, the physician was not the agent to solicit insurance, but he had an act to perform in regard to it as the agent of the company. His written instructions were to write out the answers. In this instance he failed to do it correctly. The principle upon which it has been held that the company, and not the insured, is responsible for the error of the soliciting agent is equally applicable here. This question has been repeatedly considered by this court, and in the recent case of Flynn v. Equitable Life Assur.

Soc., 9 N. Y. Week. Dig. 324, 78 N. Y. 568, 34 Am. Rep. 561, was again before us. The point presented was similar to the one now under review. The decision was in conformity with the views above expressed, and the doctrine referred to must be deemed settled."

The O'Farrell case was strikingly like the one before us, so far as the point now involved is concerned. In that case the insured agreed that his application was "made, prepared, and written" by himself, "or by his own proper agent," and that the company was "not to be held responsible for its preparation, or for anything contained therein or omitted therefrom." He warranted that the answers made to the questions in both parts of the application, including that provided for the use of the medical examiner, were "strictly correct and wholly true"; that they should "form the basis and become part of the contract of insurance," and that "any untrue answers" should "render the policy null and void." The policy itself referred to the application and declared that the statements therein contained were warranties and a part of the contract. Among the printed questions to be put by the medical examiner to the insured was the following: "Did any of the parents, grandparents, brothers, or sisters of the [28] life proposed ever have consumption, or any pulmonary or scrofulous diseases?" To this question he answered that he did not know, but the physician recorded the answer as "No." A recovery, at first denied, was finally had upon the policy and it was sustained in both appellate courts. We divided in judgment and filed no opinion, but the following extract from the opinion of the supreme court upon the last appeal suggests the view that finally prevailed: "If it be accepted as a fact that the insured made answer to this question by stating that he did not know, then such fact became one known to the company, as it was known to its agent, and if it thereafter chose to deliver the policy and accept the payment of premiums thereon, it became bound according to the tenor of its terms." In that case, as an examination of the appeal book on the files of this court shows, the answer, as made to the medical examiner by the insured, was received upon the trial, notwithstanding the strenuous objections of the defendant, and without that evidence there could have been no recovery on the policy. The affirmance of the judgment by this court necessarily involved an adjudication that such evidence was properly received.

Upon the trial of the case in hand, the defendant's objection to similar evidence on similar grounds was sustained, but both upon principle and authority we think it should have been received. This conclusion requires a reversal of the judgment and the award of a new trial, with costs to abide the event.

Chief Justice Parker Expressed his Dissent in an opinion in which Justice Gray concurred. The chief justice insisted that the decision of the court introduced "a new feature into the law of contracts, by which persons of sound and open minds and honest purposes are cut off in one direction from freedom of contract, in that they may not agree that an intermediary shall, for all purposes of the contract, be deemed the agent of one of the parties, if some court be of the opinion that he was the agent of the other," and he insisted that this was contrary to the declaration in Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309, that "parties may insert any provisions they choose in contracts, provided they violate none of the rules of law, and they should all be given their appropriate and intended effect." He also relied upon Maier v. Fidelity Mut. Life Assn., 78 Fed. 566; Bernard v. United Life Assn., 14 App. Div. 142, 42 N. Y. Supp. 527. He maintained that "in any event the defendant has the right to insist, as a condition of its issuing the policy, that an applicant shall agree that for the purposes of the application and the issuance of the policy whoever fills up the blanks, whether he be in the employ of the defendant, or a soliciting agent, or one occasionally paid by it for making a medical examination, shall for that purpose be deemed the agent of the applicant. If the applicant does not care to so agree, he need not make the application. But if he does make it and incorporates the agreement into his application, and upon the strength of it the policy is issued, he is bound by it, and the defendant is entitled to the full protection of it, and so this court and the supreme court of the United States have unvaryingly held": Citing Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Alexander v. Germania Fire Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76; Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. Rep. 837; Hamilton v. Fidelity Mut. Life Assn., 27 App. Div. 480, 50 N. Y. Supp. 526.

Life Insurance—Agency.—Notwithstanding an express stipulation in an application for insurance that the applicant makes the regular examining physician of the company his agent, such examiner, in making a medical examination of the applicant on behalf of the insurance company, is the latter's agent. And the company is bound by his report to it, when no fraud or intent to deceive on the part of the applicant is shown: Royal Neighbors v. Boman, 177

Ill. 27, 69 Am. St. Rep. 201, and cases cited in cross-reference note thereto, 52 N. E. 264. See the note to Clark v. Union etc. Ins. Co., 77 Am. Dec. 724-728, on the effect of stipulations seeking to make the agent of the insurer the agent of the assured.

Life Insurance.—False Answers inserted by a medical examiner, when the applicant for insurance answers questions truthfully, do not invalidate the insurance, although it is stipulated in the application that the examiner is the agent of the applicant: Royal Neighbors v. Boman, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264. See, in this connection, Globe etc. Ins. Assn. v. Wagner, 188 Ill. 133, 80 Am. St. Rep. 169, 58 N. E. 970.

REILLY v. SICILIAN ASPHALT PAVING COMPANY.

[170 N. Y. 40, 62 N. E. 772.]

PRACTICE.—A SINGLE AND ENTIRE CAUSE CANNOT BE SUBDIVIDED into several claims and separate actions maintained thereon. (p. 637.)

PRACTICE, SEPARATE CAUSES OF ACTION—WHEN RESULT FROM A SINGLE TORT.—If a person and his vehicle in which he is riding are both injured by a single act of negligence, two causes of action arise in his favor, and a recovery of judgment by him for damages to his vehicle does not preclude a subsequent recovery for injuries to his person. (p. 640.)

JUDGMENT—MERGER BY RECOVERY OF PART OF DAMAGES FOR A SINGLE TORT, WHEN DOES NOT TAKE PLACE.—If one suffers in his person and property from the negligence or other tortious act of another, two causes of action arise in favor of the former, and his recovery of judgment for the injuries to his property does not bar his subsequent recovery for damage to his person. (p. 640.)

E. T. Taliaferro and John Mulholland, for the appellant.

Herbert C. Smyth and Edwin A. Jones, for the respondent.

[41] CULLEN, J. The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action [42] in one of the district courts in the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further

maintenance of the action in the common pleas. On the trial of the case in the supreme court (to which under the constitution the action was transferred), it was held that the plaintiff's right of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division and an appeal has been taken to this court by allowance.

The rule is that a single or entire cause of action cannot be subdivided into several claims and separate actions maintained thereon: Secor v. Sturgis, 16 N. Y. 548; Nathans v. Hope, 77 N. Y. 420. As to this principle there is no dispute. Therefore, the question presented by this appeal is whether from the defendant's negligence and the injury occasioned thereby to the plaintiff in his person and his property there arose a single cause of action or two causes of action, one for the injury to his person and the other for injury to his property. The question is not determined by the Code of Civil Procedure, for though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action. Nor is there any controlling decision of this court on the point. In Mulligan v. Knickerbocker Ice Co. (affirmed without opinion), 109 N. Y. 657, 16 N. E. 684, the question discussed in the opinion of the learned court below and necessarily involved in the decision of this court was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that a voluntary settlement between the parties of part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by voluntary agreement, sever [48] or split up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a single tort gives rise but to a single cause of action: O'Beirne v. Lloyd, 43 N. Y. 248; Bliss v. New York Cent. etc. R. R. Co., 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England, it has been held by the court of appeal, Lord Coleridge, chief justice, dissenting, that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (Brunsden v. Humphrey, L. R. 14 Q. B. Div.

141); while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared: Doran v. Cohen, 147 Mass. 342, 17 N. E. 647; King v. Chicago etc. Ry. Co., 80 Minn. 83, 81 Am. St. Rep. 238, 82 N. W. 1113; Von Fragstein v. Windler, 2 Mo. App. 598. The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person": Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141. I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise, one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while [44] injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property that makes it impracticable or, at least, very inconvenient in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. It may be seized by creditors on a bill in equity (Hudson v. Plets, 11 Paige, 180), and would pass to an assignee in bankruptcy. Possibly the difficulties arising from the differ-

ence in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting, in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy or to a receiver on a creditor's bill without treating it as an independent cause of action. Though, as we have already said, section 484 of the code does not expressly determine the point in issue, still it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old Code of Procedure, at the time of its original enactment, injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another: Code of Procedure, sec. 167. [45] By an amendment in 1852, injuries to persons and property were put in the same class. But by section 484 of the Code of Civil Procedure they are again placed in distinct classes and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person which may be united with other causes of action for personal injuries, or is it for injury to property which may be joined with claims of the same nature, or is it sui generis, a nondescript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice Bowen, in the Brunsden case, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods or vice versa. It is true that at common law the necessity of bringing two suits could at the election of the plaintiff be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close and alleging in aggravation thereof an assault upon his person: See Waterman on Trespass, 205, 406. Still, in such a case there would be but a single cause of action, to wit, the trespass upon the close, and if the defendant justified this trespass it would be a complete defense

to the action, the personal assault being merely a matter of aggravation: Carpenter v. Barber, 44 Vt. 441.

Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

Parker, C. J., Gray, O'Brien, Martin, Vann and Werner, JJ., concur.

A Single Cause of Action Cannot be Split in order that separate suits may be brought for the various parts of what constitutes but one demand: Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 64 Am. St. Rep. 505, 42 S. W. 946; Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426; Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813.

Only One Cause of Action Arises for the separate items of damages where both a person and his property are injured by the same tortious act: King v. Chicago etc. Ry. Co., 80 Minn. 83, 81 Am. St. Rep. 238, 82 N. W. 1113.

MANHATTAN SAVINGS INSTITUTION v. NEW YORK NATIONAL EXCHANGE BANK.

[170 N. Y. 58, 62 N. E. 1079.]

NEGOTIABLE INSTRUMENTS.—THE FAILURE TO INSERT IN A BOND THE NAME OF THE PAYEE does not affect its negotiability. (p. 643.)

NEGOTIABLE INSTRUMENTS.—THE INTENTIONAL FAILURE TO INSERT THE NAME OF THE PAYEE in a negotiable instrument invests any bona fide holder with authority to fill the blank with the name of some person, and until it is so filled, the bond is payable to bearer. (p. 643.)

NEGOTIABLE INSTRUMENTS ACQUIRED FROM A THIEF.—If a negotiable instrument is issued with the payee's name in blank, and is afterward stolen, one who acquires it for value and in good faith from the thief is thereby invested with authority to fill in such blank to the same extent and with like effect as if it were acquired from the legal owner. (pp. 643, 644.)

NEGOTIABLE INSTRUMENTS.—THE PRESUMPTION IS THAT A PERSON IN POSSESSION of a negotiable instrument is a holder for value. (p. 644.)

NEGOTIABLE INSTRUMENTS, PURCHASER OF, DUTY OF INQUIRY BY.—If an instrument is transferable by indorsement and delivery or by delivery alone, a purchaser taking in good faith and for value need not investigate the bona fides or the title of the previous holders. (p. 644.)

NEGOTIABLE INSTRUMENTS—REGISTERED BONDS.—The fact that a statute authorizing the issue of municipal bonds provides that they shall be registered in the city clerk's office, in a book kept for that purpose, does not affect their negotiability. (pp. 644, 645.)

NEGOTIABLE BONDS.—NOTICE TO A PURCHASER OR PLEDGEE OF THE WANT OF TITLE of the holder of negotiable municipal bonds is not created by the facts that the name of the payee is in blank, that the bonds declare that they were registered, that he borrowed money on them as trustee, and that the corners were badly burned. (p. 646.)

NEGOTIABLE INSTRUMENTS.—THE PURCHASER OF A NEGOTIABLE INSTRUMENT IS NOT AFFECTED BY CONSTRUCTIVE NOTICE, unless it appears that the circumstances suggested an inquiry at the time of the purchase, which, if fairly pursued, would have resulted in the discovery of the defect in the title. There must be in the nature of the case such a connection between the facts appearing and the further facts to be discovered that the former may be said to furnish a reasonable and natural clew to the latter. (pp. 646, 647.)

Replevin to recover ten bonds which the plaintiff claimed defendant wrongfully retained. They were a part of a series issued by the city of Yonkers under the authority of chapter 297 of the statutes of New York for the year 1875. This statute declared that the bonds should be signed by the mayor and city clerk, that the corporate seal of the city should be attached, and they should be registered in the city clerk's office in a book to be kept for that purpose. They were delivered to the plaintiff in 1876, and a record of their numbers, amounts, dates of issue and maturity was contained in the book kept for that purpose by the city clerk of Yonkers, and a marginal note in the registry showed that they were owned by the plaintiff. Each bond recited that the "city of Yonkers is justly indebted to ——— or ——— in the sum of one thousand dollars, which the said city of Yonkers promises to pay at the office of the city treasurer of the city of Yonkers on the first day of April, 1899, with interest," etc. Each bond also referred to the act authorizing its issue, and stated that it was registered in the city clerk's office. In October, 1878, the bonds, together with other securities of great value, were stolen from the vaults of the plaintiff. Notwithstanding notice widely given describing the securities and stating their loss, none of the bonds in question were heard of until they were discovered in the possession of the defendant in April, 1896. It had received

them from George H. Pell, one of its customers, as collateral security for a loan to him of seven thousand five hundred dollars. He had been a convict and was of bad reputation, but this was unknown to the defendant, which had had several transactions with him as a depositor and in other legitimate ways. Judgment was entered for the defendant on a verdict directed by the trial court. It was affirmed by the appellate division of the first department, and the plaintiff then appealed to this court.

Percy C. Dudley and George C. De Lacy, for the respondent.

Edward S. Rapallo, for the appellant.

[63] GRAY, J. Very elaborate and careful opinions were delivered at the appellate division, upon the affirmance of the judgment below and upon the previous hearing of the defendant's exceptions, after the direction of a verdict for the plaintiff, when the new trial was ordered: Manhattan Sav. Inst. v. New York etc. Bank, 42 App. Div. 147, 59 N. Y. Supp. 51. Any extended discussion becomes, therefore, unnecessary. Whether the plaintiff or the defendant must sustain a loss is, very plainly, a question which turns upon the character of these bonds and upon the circumstances under which the defendant acquired their possession. The plaintiff lost them, as the result of a theft, and the defendant loaned its moneys upon the security of their pledge, in the most absolute good faith, as it claims. If the bonds were of that negotiable character [63] that title passed with the possession, and the defendant parted with its moneys, upon their pledge, without any circumstances which, in the eye of the law, imposed some duty of inquiry, then it obtained, and is entitled to assert, a special property in them, to the extent that they stand as security for the moneys loaned. It is insisted by the appellant that the bonds appear upon their face to be, and were in reality, non-negotiable instruments, because—1. No payee was named; and because 2. They were registered in the books of the city of Yonkers, which issued them, and they so stated. These bonds were under the seal of the municipality, and what peculiar features may have distinguished them are those stated and commented upon by the appellant.

That bonds, whether issued by a municipal corporation under its seal or issued by any other corporation, may be negotiable instruments, must be regarded as not open to discussion: Bank of Rome v. Village of Rome, 19 N. Y. 20, 75 Am. Dec. 272;

Brainerd v. New York etc. R. R. Co., 25 N. Y. 496; Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164. That the omission to insert the name of a payee is not a feature or a defect which affects their negotiability seems to be, also, well settled by authority. These bonds were issued and delivered for use in their present form, intentionally, and, therefore, their incompleteness in no wise constitutes any defense to their payment, nor could prevent the character of negotiability from attaching. Their inception as commercial instruments was valid, and the effect of the omission to name a payee was to invest any bona fide holder with the authority to fill the blank left for that purpose by the obligor. They were payable to the bearer until restricted in their currency as negotiable instruments by the insertion of the name of some particular payee: Ledwich v. McKim, 53 N. Y. 307; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; White v. Vermont etc. R. R. Co., 21 How. 575; Angle v. Northwestern Mut. Life Ins. Co., 92 U. S. 330; Cruchley v. Clarance, 2 Maule & S. 90; Daniel on Negotiable Instruments, sec. 145. Indeed, this rule of law is not disputed by the appellant; but it is contended in its behalf that the authorities [64] upon which the general rule rests go no further than to hold that any bona fide holder "in the regular chain of bona fide holders" has the implied authority to fill the blanks left in the instrument by the makers. The authority, it is said, to fill the blanks runs, primarily, to the person to whom the instrument is delivered, and he in turn, when transferring in that condition, is held likewise to authorize his transferee, and the authority thus passes to the last bona fide holder; but if the instrument is stolen from its owner in that condition, no subsequent bona fide holder can derive authority from the thief to fill in the blanks. The reasoning is ingenious; but I think it disregards the fundamental principle of the negotiability of instruments. The original intention, by issuing the bonds in blank, must have been, obviously, to make them negotiable and payable to any holder in good faith, as the bearer. The character of negotiability having once been voluntarily conferred upon the instrument by the maker, it cannot be destroyed, except by the act of a holder in limiting its payment, by proper insertion, to himself or to some other person. It was delivered for use by anyone into whose hands it might come, and the right of the holder cannot be disputed, except upon grounds which relate to the manner of his acquiring its possession and not to the form of the obligation. The principle of liability, however variously stated, is

the same. By sending the instrument into the world in its imperfect form the maker is estopped from urging, as against a bona fide holder, who has received it of anyone having it in possession, a defect of title; and the holder, though without title, has capacity to give a title, because he is the apparent owner of the instrument. As every person possessing himself of the instrument may fill in its blank space, and make it payable to himself, through the voluntary act of the maker, the holder is presumed to be the owner. In such a case, the title and the possession are inseparable and the legal presumption attaches that the party in possession holds the instrument for value until the contrary be made to appear: Cruchley v. Clarance, 2 Maule & S. 90; [65] Van Duzer v. Howe, 21 N. Y. 531; Ledwich v. McKim, 53 N. Y. 307; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Goodman v. Simonds, 20 How. 365. The principle of negotiability is in the instrument having a circulating credit and in its being transferable by indorsement and delivery, or by delivery merely. To import into the general rule a term, or an element of duty, which requires of a purchaser, taking in good faith and for value, that he investigate the bona fides, or the title, of previous holders in the chain of title, would be inconsistent with the feature, or quality, of negotiability. There is no middle term between negotiability and non-negotiability, and if, before acquiring a good title to negotiable instruments, it would be necessary for a person to make inquiry of everyone "in the regular chain of bona fide holders," as the appellant would have it, in order to be assured of his having an undisturbed current of authority to fill in the name of a payee, where would be the negotiability? The theory of negotiable instruments, and of their currency from hand to hand, like bank notes, rests upon the proposition that they appear to belong to the person having them in possession and to no one else. In the present case, the bonds were payable to anyone who took them in good faith, because his authority to fill in the name of a payee was derived, not from Pell who presented them, but from the city of Yonkers, which, as maker, sent them forth with a general warrant to any bona fide holder to make himself their payee.

But it is further contended in behalf of the appellant that the bonds were intended to be issued as registered; that they were so, in fact, and that it was so stated upon their face. I think this is a misapprehension of the legislative intent. The language of the act is not that the bonds should be issued by

the city to registered payees; nor, when read with ordinary apprehension, that they should be issued as registered bonds, in contradistinction to coupon bonds, and be non-negotiable in character. The requirement of registration was rather in the nature of a measure for the protection of the city and for a record, showing the amount of each issue and [66] its due date. The issue was not to exceed forty thousand dollars in any one year, and the date of maturity was at such times as the common council should determine. The act then provides that "such bonds shall be signed by the mayor and city clerk, and the corporate seal of the city shall be attached thereto, and they shall be registered in the city clerk's office, in a book to be kept for that purpose." The provision for registration appears to be designed to exhibit the regularity and the authority of the issue, and not to prescribe the form of the obligation. A legislative intent to prevent an issue of negotiable bonds, at the pleasure of the municipality, is not at all clear. The statement upon the face of the bond, that it was registered in the city clerk's office, simply showed compliance with the act, authorizing its issue. Had inquiry been made of the city clerk, and had the inquirer ascertained that the bonds were originally delivered to this plaintiff, he would have found the issue to be regular; but he would have been no further put upon his inquiry. As nothing in the act precluded the city from making its bonds negotiable in form and from leaving the name of the payee blank, he would have the right to assume that the plaintiff, though having the implied authority to make the bonds payable to it, and thus to limit their negotiability, had, for reasons satisfactory to itself, elected not to do so. It was in the plaintiff's power to prevent a loss by theft, or by dishonest use, by making the bonds payable to itself; but it chose not to limit their negotiability, and this consideration is not without its bearing upon the question of where this loss should fall.

The only other question which I deem at all useful to discuss is, whether there was anything in the facts and circumstances, as disclosed upon the trial, which required the learned trial judge to submit to the jury the question of the right of the plaintiff to the bonds, or the question of the defendant's good faith. This ground is well covered in the opinion delivered below at the appellate division. The appellant enumerates the facts, that the payee was blank; that the bonds declared that they were registered; that Pell borrowed upon [67] them as trustee; that the corners were burned, and, lastly, that Pell was

in fact an ex-convict and a notorious person. Nothing in the evidence tended to show that the defendant had any knowledge of Pell's previous conviction, or that he was a notorious person. Its dealings with him had extended over some time and had been commenced, and were continued in ordinary and legitimate ways. He was well connected and introduced, and no fact is shown which should have induced the defendant to look upon him with any suspicion. His account was opened in the name of "George H. Pell, trustee," in June, 1895, and down to April, 1896, when this transaction occurred, all of his monetary transactions were through that account. Coupling the word "trustee" with his name as a depositor was not an unusual or peculiar circumstance, nor necessarily imported that he was acting as trustee for others. It simply distinguished or described the account, which he opened, in a particular way satisfactory to himself, and did not call for any investigation on the part of the bank into his authority as trustee. At no time, so far as the record shows, was there any transaction, through that account or otherwise, with the bank, in the interest of persons for whom he was acting as their trustee. The bank had every right to assume, as to the bonds offered to it as collateral security by a customer, who had the account with it, that he was acting in good faith and within his lawful rights, and the fact that he was borrowing upon city bonds in no wise affected the bank's right to indulge in the assumption: American Ex. Nat. Bank v. New York Belting etc. Co., 148 N. Y. 698, 43 N. E. 168.

No other of the facts pointed out by the appellant need be further referred to, except, perhaps, the fact that the corners of these bonds appeared to be burned. They had been outstanding for some twenty years, and such a fact was no more notice of any defect or irregularity in the seller's title to them than if they had been torn or mutilated by long use. A purchaser was not bound, in order to escape the imputation of bad faith, to make an investigation for such reasons. The rights of the purchaser of a negotiable instrument are not to [68] be affected by constructive notice; unless it appears that the circumstances suggested an inquiry at the time of the purchase, which, if fairly pursued, would have resulted in the discovery of the defect in the title. There must appear to be, in the nature of the case, such a connection between the facts appearing and the further facts to be discovered that the former may be said to furnish a reasonable and natural clew to the latter: Birdsall v.

Russell, 29 N. Y. 220; Dutchess Co. Mut. Ins. Co. v. Hachfield, 73 N. Y. 226.

There was no natural nor logical connection between the facts pointed out by the appellant and the fact of a defective title in Pell, and I find no evidence in the case that devolved any duty of inquiry upon the defendant, or cast suspicion upon its part in the transaction. The direction of a verdict, therefore, constituted no error, in my opinion.

After a careful consideration of this case, in the light of the very able argument which was made by the appellant's counsel, I am unable to conclude that any error was committed by the trial court which would warrant a new trial, and I therefore advise the affirmance of the judgment appealed from, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Martin and Vann, JJ., concur.

Bills and Notes—Filling Blanks.—Where one has intrusted an instrument containing blanks to another with the intent to become bound thereon, he will be liable upon the instrument though the blanks are filled. He is deemed to have given an implied authority to the payee or holder to fill the blanks with the proper terms: See the monographic note to Burgess v. Blake, 86 Am. St. Rep. 107, 108.

Bills and Notes.—Bona Fide Ownership of negotiable instruments is considered in the monographic notes to Bedell v. Herring, 11 Am. St. Rep. 309-326; Sims v. Lyles, 26 Am. Dec. 156-158. The purchaser of negotiable paper is not bound at his peril to be on the watch for facts that might put a cautious man on his guard: Second Nat. Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080; Cheever v. Pittsburgh etc. R. R. Co., 150 N. Y. 59, 55 Am. St. Rep. 646, 44 N. E. 701. And it has been held that even negligence on his part will not deprive him of the character of bona fide: Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Central State Bank v. Spurlin, 111 Iowa, 187, 82 Am. St. Rep. 511, 82 N. W. 493. But he is not entitled to protection if he had such credible information or was placed in such a situation as would have put a reasonable man on inquiry, which would disclose defenses to the note: Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281. Possession of a negotiable note properly indorsed is prima facie evidence that the holder is a bona fide purchaser: Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, 60 Pac. 327.

The Negotiability of Municipal Bonds is considered in Scollans v. Rollins, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863; Bloomington v. Smith, 123 Ind. 41, 18 Am. St. Rep. 310, 23 N. E. 972.

NATIONAL PROTECTIVE ASSOCIATION OF STEAM-FITTERS AND HELPERS v. CUMMING.

[170 N. Y. 315, 63 N. E. 369.]

COMBINATIONS BY WORKMEN NOT TO WORK WITH NONUNION MEN.—Workmen have a full and legal right to say that they will not work with certain men, and their employers must accept their dictation or go without their service. (p. 651.)

STRIKES TO COMPEL THE DISCHARGE OF WORKMEN, WHEN NOT UNLAWFUL.—The action of a labor union and its walking delegates in causing the discharge of certain workmen by threatening their employers with a strike is not unlawful when the object is restricted to obtaining employment for the members of such union. (p. 654.)

Andrew J. Shipman, for the appellants.

Charles Steckler and Levin L. Brown, for the respondents.

320 PARKER, C. J. The order of the appellate division should be affirmed, on the ground that the facts found do not support the judgment of the special term. In the discussion of that proposition I shall assume that certain principles of law laid down in the opinion of Judge Vann are correct, namely: "It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from 321 anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor or improving their relations with their employers. They have the right to strike; that is, to cease working in a body by pre-arrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law."

Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground

that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employé's giving a reason, if he has one, and the fact that the reason given is, that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work, nor does it give a cause of action to the workman to whom he objects because the employer sees fit to discharge the man objected to rather than lose the services of the objector.

The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but, if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And if the conduct of the members of an organization is legal in itself, it does not become illegal because [322] the organization directs one of its members to state the reason for its conduct.

The principles quoted above recognize the legal right of members of an organization to strike—that is, to cease working in a body by pre-arrangement until a grievance is redressed, and they enumerate some things that may be treated as the subject of a grievance—namely, the desire to obtain higher wages, shorter hours of labor or improved relations with their employers, but this enumeration does not, I take it, purport to cover all the grounds which will lawfully justify members of an organization refusing, in a body and by pre-arrangement, to work. The enumeration is illustrative rather than comprehensive, for the object of such an organization is to benefit all its members and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization, as, for instance, to secure the re-employment of a member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organization who may be out of employment, although the effect will be to cause the discharge of other employés who are not members.

And whenever the courts can see that a refusal of members of an organization to work with nonmembers may be in the

interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice and to inflict injury upon such nonmembers.

A number of reasons for the action of the organization will at once suggest themselves in a case like this. One reason apparent from the findings in this case, as I shall show later, is the desire of the organization that its own members may do the work the nonmembers are performing. And another most important reason is suggested by the fact that these particular organizations, associations of steam-fitters, required every applicant for membership to pass an examination testing his competency. Now, one of the objections sometimes [323] urged against labor organizations is that unskillful workmen receive as large compensation as those thoroughly competent. The examination required by the defendant associations tends to do away with the force of that objection as to them. And again, their restriction of membership to those who have stood a prescribed test must have the effect of securing careful as well as skillful associates in their work, and that is a matter of no small importance in view of the state of the law, which absolves the master from liability for injuries sustained by a workman through the carelessness of a coemployé. So long as the law compels the employé to bear the burden of the injury in such cases it cannot be open to question but that a legitimate and necessary object of societies like the defendant associations would be to assure the lives and limbs of their members against the negligent acts of a reckless coemployé and hence it is clearly within the right of an organization to provide such a method of examination and such tests as will secure a careful and competent membership, and to insist that protection of life and limb requires that they shall not be compelled to work with men whom they have not seen fit to admit into their organization, as happened in the case of the plaintiff McQueed.

While I purpose to take the broader ground, which I deem fully justified by the principles quoted as well as the authorities, that the defendants had the right to strike for any reason they deemed a just one, and, further, had the right to notify their employer of their purpose to strike, I am unable to see how it is possible to deny the right of these defendant organizations and their members to refuse to work with nonmembers, when, in the event of injury by the carelessness of such

coemployés, the burden would have to be borne by the injured, without compensation from the employer and with no financial responsibility, as a general rule, on the part of those causing the injury; for it is well known that some men, even in the presence of danger, are perfectly reckless of themselves and careless of the rights of others, with the result that accidents are occurring almost constantly which snuff out the [324] lives of workmen as if they were candles, or leave them to struggle through life maimed and helpless. These careless, reckless men are known to their associates, who not only have the right to protect themselves from such men, but, in the present state of the law, it is their duty, through their organizations, to attempt to do it, as to the trades affording special opportunities for mischief arising from recklessness.

I know it is said in another opinion in this case that "workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ"; but I dissent absolutely from that proposition, and assert that, so long as workmen must assume all the risk of injury that may come to them through the carelessness of coemployés, they have the moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services.

If it be true, as was recently intimated by the supreme court of Pennsylvania in Durkin v. Kingston Coal Co., 171 Pa. St. 193, 50 Am. St. Rep. 801, 33 Atl. 237, that an act of the legislature which undertakes to "reverse the settled law upon the subject and declare that the employer shall be responsible for an injury to an employé resulting from the negligence of a fellow-workman" is unconstitutional—a doctrine from which I dissent (see Tullis v. Lake Erie etc. R. R. Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136), but which it is possible may receive the support of the courts—then the only opportunity for protection, in the future, as well as the present, to workmen engaged in dangerous occupations is through organizations like these defendant associations, which restrict their memberships to careful and skillful men, and prohibit their members from working with members of other organizations which maintain a lower standard or none at all. For the master's duty is discharged if the workman be competent, and for his recklessness, which renders his employment a menace to others, the master is not responsible.

But I shall not further pursue this subject. My object in alluding to it is to emphasize the fact that there are other

purposes for which labor organizations can be effectually used [325] than those quoted above; and also, because it is fairly inferable from the facts found that the members of plaintiff association were objectionable to defendants because not up to the latter's standards, so as to make them eligible for membership in defendant organizations, and that this was the motive for defendants' acts in holding a strike and notifying their employer of their intention to do so. But whether this be so or not, when it can be seen from the facts found that such or other motives of advantage to themselves may have prompted defendants' action, a court which can review only upon the law certainly will not presume that another and an unlawful motive and one not stated in the findings of fact, prompted the action of the organization and its members; in other words, this court cannot import into the findings of fact a fact that is not therein expressed. This is not a case of unanimous affirmance, but one of reversal, and under section 1338 of the Code of Civil Procedure we are to assume that the appellate division intended to affirm the facts as found by the trial court, and having so affirmed them it then reversed because they were insufficient in law to support the judgment. It is our duty, therefore, if we discover that the facts as actually found are insufficient to support the conclusion of law, to sustain the action of the appellate division in reversing the judgment: National Harrow Co. v. Bement & Sons, 163 N. Y. 505, 57 N. E. 764, and cases cited.

In Bowen v. Matheson, 14 Allen, 499, the court had before it on demurrer a declaration in an action where the defendants' business had been practically broken up, and it said: "In order to be good, the declaration must allege against the defendants the commission of illegal acts. Its allegations must be analyzed to ascertain whether they contain a sufficient statement of such acts." This was followed by an interesting analysis which resulted in disclosing that no illegal act was alleged, notwithstanding the liberal use of such extravagant words and phrases as "maliciously conspiring together," and "fellow conspirators as aforesaid in pursuance of their conspiracy as aforesaid," whereupon the demurrer was sustained [326] and a precedent created which should be followed in this case.

Now, before taking up the findings of fact for analysis in the light of the principles quoted above, as was done in Bowen's case, and with the view of showing that they do not sustain the judgment of the special term, I wish to again call attention to the rules quoted, and particularly to so much of them as

intimates that if the motive be unlawful or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act, which would be otherwise legal, becomes unlawful. To state it concretely, if an organization strikes to help its members, the strike is lawful. If its purpose be merely to injure nonmembers, it is unlawful. If the organization notifies the employer that its members will not work with nonmembers, and its real object is to benefit the organization and secure employment for its members, it is lawful. If its sole purpose be to prevent nonmembers working, then it is unlawful. I do not assent to this proposition, although there is authority for it. It seems to me illogical and little short of absurd to say that the everyday acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motive of the actor. If the motive be good, the act is lawful; if it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good; but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad; and some court may say to a jury, who are generally the triers of fact, that a given act of competition which destroyed A's business was legal if the act was prompted by a desire on the part of the defendant to secure to himself the benefit of it, but illegal if its purpose was to destroy A's business in revenge for an insult given.

But for the purpose of this discussion, I shall assume this proposition to be sound, for it is clear to me that, applying [327] that rule to the facts found, it will appear that the appellate division order should be sustained.

While I shall consider every fact found by the learned trial judge, I shall consider the findings in a different order, because it seems to me the more logical order. He finds "that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various pieces of work upon buildings in the course of erection, ... by threatening the employers that if they did not discharge the members of the plaintiff association and employ the members of the Enterprise and Progress associations in their stead, the said walking delegates

would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes, ... in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that said employers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association and employed the members of the Enterprise and Progress associations in their stead."

Now, there is not a fact stated in that finding which is not lawful within the rules which I have quoted supra. Those principles concede the right of an association to strike in order to benefit its members; and one method of benefiting them is to secure them employment, a method conceded to be within the right of an organization to employ. There is no pretense that the defendant associations or their walking delegates had any other motive than one which the law justifies, of attempting to benefit their members by securing their employment. Nowhere throughout that finding will be found even a hint that a strike was ordered or a notification given of the intention to order a strike for the purpose of accomplishing any other result than that of securing the discharge of the members [328] of the plaintiff association and the substitution of members of the defendant associations in their place. Such a purpose is not illegal within the rules laid down in the opinion of Judge Vann nor within the authorities cited therein; on the contrary, such a motive is conceded to be a legal one. It is only where the sole purpose is to do injury to another, or the act is prompted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one. It is beyond the right and the power of this court to import into that finding, in contradiction of another finding or otherwise, the further finding that the motive which prompted the conduct of defendants was an unlawful one, prompted by malice and a desire to do injury to plaintiffs without benefiting the members of the defendant associations.

I doubt if it would ever have occurred to anyone to claim that there was anything in that finding importing a different motive from that specially alleged in the finding, had not the draughtsman characterized the notice given to the employers by the associations of their intention to strike as "threats."

The defendant associations, as appears from the finding quoted, wanted to put their men in the place of certain men at work who were nonmembers working for smaller pay, and they set about doing it in a perfectly lawful way. They determined that if it were necessary they would bear the burden and expense of a strike to accomplish that result, and in so determining they were clearly within their rights, as all agree. They could have gone upon a strike without offering any explanation until the contractors should have come in distress to the officers of the associations asking the reason for the strike. Then, after explanations, the nonmembers would have been discharged, and the men of defendant associations sent back to work. Instead of taking that course, they chose to inform the contractors of their determination and the reason for it.

It is the giving of this information, a simple notification of 329 their determination, which it was right and proper and reasonable to give, that has been characterized as "threats" by the special term, and which has led to no inconsiderable amount of misunderstanding since. But the sense in which the word was employed by the court is of no consequence, for the defendant associations had the absolute right to threaten to do that which they had the right to do. Having the right to insist that plaintiff's men be discharged and defendants' men put in their place if the services of the other members of the organization were to be retained, they also had the right to threaten that none of their men would stay unless their members could have all the work there was to do.

The findings further stated that the defendants Cumming and Nugent were the walking delegates of the defendant associations, and as such were members of the board of delegates of the building trades in New York, and were, therefore, in control of the matters in their respective trades. The trial court also found "that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence."

Now, this finding should be read in connection with, and in the light of, the other findings which I have already read and commented on, and which show that the purpose of the strike

was to secure the employment of members of the defendant associations, in the places filled by the members of plaintiff's association, who were willing to work for smaller wages—a perfectly proper and legitimate motive, as we have seen. But if the other findings be driven from the mind while considering this one, which the opinions of the appellate division indicate was not justified by the evidence, it will be found that it fairly means no more than that the defendant associations did not purpose to allow McQueed and the members of 330 his association to work upon any jobs where members of defendant associations were employed; that they were perfectly willing to allow them to have small jobs, fitted perhaps for men who were willing to work for small wages, but that the larger jobs where they could afford to pay, and would pay the rate of wages demanded by defendant associations, they intended to secure for their members alone—a determination to which they had a perfect right to come, as is conceded by the rules which I have quoted.

Having reached that conclusion, defendants notified McQueed, who had organized an association when he failed to pass the defendants' examination, that they would prevent him and the men of his association from working on a certain class of jobs. They did not threaten to employ any illegal method to accomplish that result; they notified them of the purpose of the defendants to secure this work for themselves and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do, and when a man purposes to do something which he has the legal right to do, there is no law which prevents him from telling another, who will be affected by his act, of his intention.

A man has a right under the law to start a store and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs, and that, on this ground, the infliction of damages is privileged: Commonwealth v. Hunt, 4 Met. 111, 134, 38 Am. Dec. 346.

Nor could this storekeeper be prevented from carrying out his scheme because, instead of hiding his purpose, he openly

declared to those storekeepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such storekeepers, in the event of their [331] bringing an action to restrain him from accomplishing their ruin by underselling them, to persuade the trial court to characterize the notification as a "threat," for on review the answer would be: A man may threaten to do that which the law says he may do, provided that, within the rules laid down in those cases, his motive is to help himself.

A labor organization is endowed with precisely the same legal right as an individual to threaten to do that which it may lawfully do.

Having finished the discussion of the facts, I reiterate that, within the rules of law I have quoted, it must appear, in order to make out a cause of action against these defendants, that in what they did they were actuated by improper motives, by a malicious desire to injure the plaintiffs. There is no such finding of fact, and there is no right in this court to infer it, if it would, and from the other facts found it is plain that it should not, if it could.

The findings conclude with a sentence which commences as follows: "I find that the threats made by the defendants and the acts of the said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workmen, constituted an illegal combination and conspiracy." That is not a finding of fact, but a conclusion of law that the trial court erroneously, as I think, attempted to draw from the facts found, which I have already discussed, and which clearly, in my judgment, require this court to hold that the defendants acted within their legal rights.

In the last analysis of the findings, therefore, it appears that they declare that members of the organizations refused to work any longer (as they lawfully might); that they threatened to strike (which was also within their lawful right), but without any suggestion whatever in the findings that they threatened an illegal or unlawful act. And such findings are claimed to be sufficient to uphold a judgment that absolutely enjoins the defendant associations and their members from striking. This is certainly a long step in advance of any decision brought to my attention.

[332] I have refrained from discussing the authorities because it seemed unnecessary, for the reason already stated in this

opinion. But it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought, at least, to be received with caution, in view of the fact that the later ones are largely supported by early precedents which are entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions. In support of this view, reference to a few early statutes of England will be made.

The statutes (for there are two) of Labourers, passed in 1349 and 1350 (23 Edward III, and 25 Edward III, st. 1) provided: "That every man and woman of what condition he be, free or bond, able in body, and within the age of three score years," and not having means of his own, "if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require." And the statutes provide that in case of refusal to serve, punishment by imprisonment might be inflicted, and that the laborer should take the customary rate of wages and no more. These statutes not only regulated the wages of laborers and mechanics, but they confined them to their existing places of residence and required them to swear to obey the provisions of the statutes. Sir James Fitzjames Stephen, in his History of the Criminal Law of England (volume 3, page 204), says: "The main object of these statutes was to check the rise in wages consequent upon the great pestilence called the black death."

Nearly two hundred years later, and in 1548, a more general statute was passed, which forbade all conspiracies and covenants of artificers, workmen or laborers, "not to make or do their work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss of an ear, and to "be taken as a man 'infamous' ": 2 & 3 Edward VI, c. 15.

Fourteen years later the prior statutes were to some extent amended and consolidated into a longer act, entitled "An act 333 containing divers orders for artificers, laborers, servants of husbandry, and apprentices." It provided, in effect, that all persons able to work as laborers or artificers and not possessed of independent means or other employments are bound to work as artificers or laborers on demand. The hours of work are fixed; power is given to the justices in their next session after Easter to fix the wages to be paid to mechanics and laborers; elaborate rules are laid down as to apprenticeship,

and it further provides that for the future no one is to "set up, occupy, use, or exercise any craft, mystery, or occupation now used" until he has served an apprenticeship of seven years: 5 Elizabeth, c. 4. This statute remained in force practically for a long period of time, and was not formally repealed until the year 1875.

In the year 1720 an act was passed declaring all agreements between journeymen tailors, "for advancing their wages, or for lessening their usual hours of work" to be null and void, and subjecting persons entering into such an agreement to imprisonment with or without hard labor for two months: 7 George I, st. 1, c. 13. Similar enactments were passed as to employés in other manufactures and trades.

The act of 1800 (40 George III, c. 60) provided for a penalty of three months' imprisonment without hard labor, or two months with hard labor for every journeyman, workman, or other person who "enters into any combination to obtain an advance of wages, or lessen or alter the hours of work or who hinders any employer from employing any person as he thinks proper, or who, being hired, refuses without any just or reasonable cause to work with any other journeyman or workman employed or hired to work." The same penalty is inflicted upon persons who attend meetings held for the purpose of collecting money to further such effort, and the act also makes it an offense to assist in maintaining men who are on strike. This statute, as well as the others referred to, have at last been swept away, but necessarily their influence has been not inconsiderable in shaping the decisions of the courts of England.

334 The order should be affirmed and judgment absolute ordered for defendants on the plaintiffs' stipulation, with costs.

GRAY, J. I express my concurrence with the conclusion, which has been reached by the chief judge in his opinion, that the order of the appellate division should be affirmed.

Briefly stated, my view is that the respondents had the legal right to accomplish their object by all methods not condemned by the law. That object was to secure the employment of the members of their own association, in preference to, and to the exclusion of, those of the appellant association. They infringed upon no law in declaring to the employers of members of the appellant organization that they refused to work with them; or that they would abandon their work unless the others

were discharged; or in preventing the members of the appellant association from being employed as steam-fitters. The case is not within the principle of Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297. Upon the facts of that case, as they were admitted by the demurrer to the complaint, the plaintiff was threatened, if he did not join a certain labor organization, and so long as he refused to do so, with such action as would result in his discharge from employment and in an impossibility for him to obtain other employment anywhere, and, in consequence of continuing his refusal to join the organization, his discharge was procured through false and malicious reports, affecting his reputation with members of his trade and with employers. There is no such compulsion or motive manifest here. There is no malice found. There is no threat of a resort to illegal methods. We may assume (and the evidence would justify the assumption) that the action of the respondents was based upon a proper motive, relating to the employment of mechanics whose competency and efficiency had been examined into and approved. The contest is between rival labor organizations, it is true. The respondents have succeeded, through the threat that other workmen would leave their work if the members of the appellant organization were not discharged, in procuring the [335] employment of the members of their own association. But no unlawful means were taken, nor were any illegal acts committed in bringing about that result. It was not an effort to compel the members of the appellant organization to join the respondents' association as a condition of being allowed to work. There is no finding to that effect. On the contrary, it appears that the appellant, McQueed, having failed to pass the required examination to become a qualified member of the respondents' association, proceeded to organize an association of his own. Regarded either as an effort to secure only the employment of efficient and approved workmen, or as a mere struggle for exclusive preference of employment, on their own terms and conditions, from either standpoint how can it be said to be within the condemnation of the law, or of any statute, when there was no force employed, nor any unlawful act committed? Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses, and to make any contract upon the subject that he chooses. There is the same freedom to organize, in an association with others of his craft, to further their common interests as workingmen, with respect to their wages, to their hours of labor,

or to matters affecting their health and safety. They are free to secure the furtherance of their common interests in every way which is not within the prohibition of some statute, or which does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results when not caused by illegal means or acts.

I concur with the chief judge in his analysis of the decision of the trial court, and that the facts, as therein stated, do not compel the legal conclusion which the learned trial judge reached.

I vote for the affirmance of the order of the appellate division.

From the Opinion of the Court three of its seven members dissented, and their dissent was expressed by Vann, Judge, in which Justices Bartlett and Martin concurred. Such dissenting opinion was as follows: "The National Protective Association of Steam-Fitters and Helpers is a domestic corporation, organized to furnish competent steam-fitters and helpers in all branches to the general public, to protect its members in the pursuit of that business, and for other purposes. The plaintiff, Charles McQueed, is a member of that corporation, and sues for the benefit of himself and his fellow-members. The defendant O'Brien is the president of the board of delegates; the defendant Duff is the treasurer of the Enterprise Association of Steam-Fitters; the defendant Mallaney is the treasurer of the Progress Association of Steam-Fitters and Helpers; the defendant Cumming is an officer known as the walking delegate of the Enterprise association; the defendant Nugent is the walking delegate of the Progress association; and both Cumming and Nugent are ex-officio members of the board of delegates. Each of these associations is unincorporated and consists of more than seven members. This action was brought to restrain the defendant from preventing the employment of the plaintiff corporation or its members, and from coercing their discharge by any employer through threats, strikes, or otherwise, and to recover damages with other relief. The issues joined by the answers of the several defendants were tried at special term. The trial justice adopted the short form of decision, but in stating the grounds upon which he proceeded found specifically 'that the defendants have entered into a combination which prevents, and will continue to prevent, the plaintiff McQueed and the other members of the plaintiff association from working at his or their trade in the city of New York; that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the

plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence; that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various places of work upon buildings in the course of erection by (naming three different employers who were erecting buildings at different places in the boroughs of Brooklyn and Manhattan), by threatening the said employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise Progress Association in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that the said employers, by reason of said threats and acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association and employed the members of the Enterprise and Progress Association in their stead ; that the threats made by the defendants and the acts of said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workingmen, constituted an illegal combination and conspiracy, injured the plaintiff association in its business, deprived its members of employment and an opportunity to labor, prevented them from earning their livelihood in their trade or business.'

"A judgment was directed and entered restraining the defendants from 'preventing the work, business or employment of the plaintiff corporation or any of its members in the city of New York or elsewhere, and from coercing or obtaining by command, threats, strikes or otherwise the dismissal or discharge by any employer, contractor or owner, of the members of the plaintiff corporation, or the plaintiff McQueed, or any or either of them from their work, employment, or business, or in anywise interfering with the lawful business or work of the plaintiff corporation or of its members. But the defendants are not, nor is any one of them, enjoined and restrained from refusing to work with the plaintiff or any member of the plaintiff corporation.'

"The appellate division, according to its order, which is the only evidence of its action that we can consider, did not reverse upon a question of fact, and a reversal upon the law only is an affirmance of the facts found, which are thus placed beyond our control,

as there was some evidence to support the findings: People v. Adirondack Ry. Co., 160 N. Y. 225, 235, 54 N. E. 689; Code Civ. Proc., sec. 1338.

"Thus we have before us a controversy, not between employer and employé, but between different labor organizations, wherein one seeks to restrain the others from driving its members out of business and absolutely preventing them from earning a living by working at their trade, through threats, made to the common employer of members of all the organizations, to destroy his business unless he discharged the plaintiff's members from his employment.

"The primary question is whether the action of the defendants was unlawful, for a lawful act, done in a lawful manner, cannot cause actionable injury. It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act.

"Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor or improving their relations with their employers. They have the right to strike—that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others but to improve their own condition, is not a violation of law. They have the right to go further and to solicit and persuade others, who do not belong to their organization and are employed for no fixed period, to quit work also, unless the common employer of all assents to lawful conditions designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends and pressure begins the law is violated, for that is a trespass upon the rights of others and is expressly forbidden by statute: Pen. Code, sec. 168. They have no right, by force, threats or intimidation, to prevent members of another labor organization from working, or a contractor from hiring them, or continuing them in his employment. They may not threaten to cripple his business unless he will discharge them, for that infringes upon liberty of action and violates the right which every man has to conduct his business as he sees fit, or to work for whom and on what terms he pleases. Their labor is their property to do with as they choose, but the labor of others is their property in turn and is entitled to protection against

plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence; that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various places of work upon buildings in the course of erection by (naming three different employers who were erecting buildings at different places in the boroughs of Brooklyn and Manhattan), by threatening the said employers that if they did not discharge the members of the plaintiff association and employ the members of the Enterprise Progress Association in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that the said employers, by reason of said threats and acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association and employed the members of the Enterprise and Progress Association in their stead ; that the threats made by the defendants and the acts of said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workingmen, constituted an illegal combination and conspiracy, injured the plaintiff association in its business, deprived its members of employment and an opportunity to labor, prevented them from earning their livelihood in their trade or business.'

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"Thus we have before us a controversy, not between employer and employé, but between different labor organizations, wherein one seeks to restrain the others from driving its members out of business and absolutely preventing them from earning a living by working at their trade, through threats, made to the common employer of members of all the organizations, to destroy his business unless he discharged the plaintiff's members from his employment.

"The primary question is whether the action of the defendants was unlawful, for a lawful act, done in a lawful manner, cannot cause actionable injury. It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act.

"Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor or improving their relations with their employers. They have the right to strike—that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others but to improve their own condition, is not a violation of law. They have the right to go further and to solicit and persuade others, who do not belong to their organization and are employed for no fixed period, to quit work also, unless the common employer of all assents to lawful conditions designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends and pressure begins the law is violated, for that is a trespass upon the rights of others and is expressly forbidden by statute: Pen. Code, sec. 168. They have no right, by force, threats or intimidation, to prevent members of another labor organization from working, or a contractor from hiring them, or continuing them in his employment. They may not threaten to cripple his business unless he will discharge them, for that infringes upon liberty of action and violates the right which every man has to conduct his business as he sees fit, or to work for whom and on what terms he pleases. Their labor is their property to do with as they choose, but the labor of others is their property in turn and is entitled to protection against

wrongful interference. Both may do what they please with their own, but neither may coerce another into doing what he does not wish to with his own. The defendant associations made their own rules and regulations, and the plaintiff corporation did the same. Neither was entitled to any exclusive privilege, but both had equal rights according to law. The defendants could not drive the plaintiff's members from the labor market absolutely, and the plaintiff could not drive the defendant's members therefrom. The members of each organization had the right to follow their chosen calling without unwarrantable interference from others. Public policy requires that the wages of labor should be regulated by the law of competition and of supply and demand, the same as the sale of food or clothing. Any combination to restrain 'the free pursuit in this state of any lawful business,' in order 'to create or maintain a monopoly,' is expressly prohibited by statute, and an injunction is authorized to prevent it: Matter of Davies, 168 N. Y. 89, 96, 61 N. E. 118; Laws 1897, c. 383; Laws 1899, c. 690.

"A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their business, as distinguished from a legitimate advancement of the defendants' own interests. While they had the right by fair persuasion to get the work of the plaintiff McQueed, for instance, they had no right, either by force or by threats, to prevent him from getting any work whatever, or to deprive him of the right to earn his living by plying his trade. Competition in the labor market is lawful, but a combination to shut workmen out of the market altogether is unlawful. One set of laborers, whether organized or not, has no right to drive another set out of business or prevent them from working for any person, upon any terms satisfactory to themselves. By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment. They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. While no physical force was used, the practical effect was that members of one labor organization drove the members of another labor organization out of business and deprived them of the right to labor at their chosen vocation. Depriving a mechanic of employment by unfair means is the same in principle as depriving a tradesman of his customers by unfair means, which has always been held a violation of law.

"A conspiracy is a combination to do an illegal act by legal means, or any act by illegal means. Here, the means used were illegal, because they tended and were designed to injure a man in his business, without lawful excuse. A threat, whether made

by one alone or by many acting in combination, to injure a man in his business unless he will conduct it in a way that he does not wish to, is a tortious act, because it interferes with business freedom, and if it results in injury it is actionable. Every man has the right to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases and is not obliged to employ those whom, for any reason, he does not wish to have work for him. He has the right to the utmost freedom of contract and choice in this regard, and interference with that freedom is against public policy, because it tends not only to destroy competition, but, in a broad sense, to deprive a man of both liberty and property: People v. Gillson, 109 N. Y. 389, 399, 4 Am. St. Rep. 465, 17 N. E. 343; Slaughter-house Cases, 16 Wall. 116, 122. Threatening, molesting, intimidating and obstructing others in their trade or calling is contrary to law, because it is in violation of personal rights, in restraint of trade, and injurious to society. It tends to force able-bodied and competent workmen into idleness and prevent them from helping to do the work of the country. Workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ. The plaintiff's men had the right to work without molestation by members of other labor unions, exercised either directly against themselves, or indirectly through their employers. They had the right to have their relations with their employers left undisturbed and this right was intentionally invaded by the defendants without lawful justification. The object was evil, for it was not to compete for employment by fair means, but to exclude rivals from employment altogether by unfair means. The law gives all men an equal chance to live by their own labor, and does not permit one labor union to seize all the chances by compelling employers to refuse employment to the members of all other unions. The plaintiffs do not ask for protection against competition, but from 'malicious and oppressive interference' with their right to work at their trade.

"The object of the defendants was not to get higher wages, shorter hours or better terms for themselves, but to prevent others from following their lawful calling. Thus, one of the defendants said to the plaintiff McQueed: 'I will strike against your men wherever I find them, and not allow them to work on any job in the city, except some small place where the Enterprise men are not employed.'

"The same man said to one of the contractors that he could not have the plaintiff's men in his employment, and unless they were discharged he would order a 'general strike of the whole building.' They were discharged accordingly, although the contractor testified that they were good workmen, that their work was satisfactory, and that he had no reason for discharging them other than the threats made. Another contractor testified that two of the defendants told him that he must take the plaintiff's men off and put their

men on, 'or else the whole building would be tied up, as they would not allow the other men to work.' The usual discharge followed, although the men were satisfactory to their employer. The same witness testified that 'Mr. Cumming would neither allow my men to work, nor would he allow his men to go to work until the time had been paid for between the interval they struck and the time they were to go to work again.'

"A member of the plaintiff corporation swore that 'Mr. Cumming told us that if he ever found us on a job in the vicinity of New York, he would strike it by order of the board of delegates. He said they would not allow us to work on any job, except it was a small job, a cheap job, and he allowed us to do it.' The threat was repeated in substance to the employer, who discharged the witness and he was not employed on the building afterward.

"There was other evidence to the same effect, and although the defendants denied making these threats the trial judge accepted the version of the plaintiff's witnesses, and, hence, we must do the same. I assume, therefore, that the defendants caused the discharge of the plaintiff's men by threatening to cripple their employer's business unless he discharged them, and that they also molested them by threatening to prevent them from working at their trade in the city of New York, by calling a general strike of all trades on any building where they might be employed. The action of the defendants was wrongful and malicious, and their object was to force men, who had learned a trade, to abandon it and take up some other pursuit. There is no finding that the defendants maintain a higher standard of skill than the plaintiffs.

"It may be argued that the employers were not obliged to yield to these threats, and this is true; but noncompliance meant ruin to them, for their work would be completely tied up and their business paralyzed. A threat, with ruin behind it, may be as coercive as physical force. The effect of such threats upon men of ordinary nerve is well known. They could not perform their contracts and would thus be subjected to great loss. Hence, against their will, they yielded to unlawful demands. Personal liberty was interfered with through coercion of the will. Some of them knew from experience, as the record shows, that the military discipline of the defendant organizations practically compelled instant obedience of an order to strike. When an association is so strong and its discipline so perfect that its orders to strike are equivalent to the commands of an absolute monarch, the effect is the same as the use of physical force: 1 Tiedeman's State and Federal Control of Persons and Property, 433; Erle on Trade Unions, 12, 105.

"The purposes of the defendants, as well as the methods pursued by them, were unlawful and authorized the injunction granted by the trial court, in order to prevent irreparable injury and a multiplicity of suits. This was conceded in Reynolds v. Everett, 144

N. Y. 189, 39 N. E. 72, and demonstrated in Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303. Each man would be compelled to bring a separate action every time he was discharged. An action at law, especially against an unincorporated association, would ordinarily do no good, and in most cases ruin would anticipate relief. Damages would not adequately redress the wrong and the mere statement of the facts shows the impossibility of adequately measuring the damages in this class of actions. That damages were sustained is clear, but what evidence can prove the amount, and what intelligence is keen enough to resolve them into dollars and cents? Unless equity will take jurisdiction, the wrong done is practically without a remedy. Unlawful combinations of capital are restrained without hesitation, and the same test of illegality should be applied to combinations of labor, for both are equal before the law, and both are covered by the same statute: Laws 1897, c. 383; Laws 1899, c. 690. The prejudice, said to exist in some minds against interference by courts of equity in labor disputes, should not be heeded, for if upon well-settled principles the courts have jurisdiction, they must exercise it, or refuse to do their duty. Public opinion may express itself in legislation, but not in judicial decisions.

"The fact that a lawful strike inflicts injury upon the employer is not controlling. As was said by a recent writer upon the subject: 'The courts recqgnize the right of workingmen to combine together for the purpose of bettering their condition, and in endeavoring to attain their object they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to attain a legitimate purpose—namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the nonunion employé will strengthen and benefit the union, and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen, that the law does not look beyond the immediate loss and damage to the innocent parties, to the remote benefits that might result to the union': 1 Eddy on Combinations, 416.

"The conclusions I have announced are supported by the weight of authority in this country and in England. The leading case in this state is controlling in principle and requires a reversal of the order appealed from: Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297. The plaintiff in that case alleged in his

complaint that the defendants wrongfully conspired to injure him and take away his means of earning a livelihood; that they threatened to accomplish this unless he would join their association; that in pursuance of the conspiracy, 'upon plaintiff's refusing to become a member of said association,' the defendants 'made complaint to the plaintiff's employers and forced them to discharge him from their employ, and, by false and malicious reports in regard to him, sought to bring him into ill-repute with members of his trade and employers and to prevent him from prosecuting his trade and earning a livelihood.' The answer set forth an agreement between a brewer's association and a labor organization, of which defendants were members, to the effect that all employés of the brewery companies belonging to the former should be members of the latter, and that no employé should work for a longer period than four weeks without becoming a member. It was further alleged that the plaintiff was retained in the employment of one of the brewing companies for more than four weeks after he was notified of the provisions of said agreement requiring him to become a member of the local assembly; that the defendants requested him to become a member, and on his refusal to comply, they, through their committee, notified the officers of said company that the plaintiff, after repeated requests, had refused for more than four weeks to become a member of said assembly, and that they did so solely in pursuance of said agreement and in accordance with the terms thereof, without intent or purpose to injure plaintiff in any way.

"The plaintiff demurred to this defense upon the ground that it was insufficient, in law, upon the face thereof. The demurrer was sustained in all the courts: Curran v. Galen, 77 Hun, 610, 28 N. Y. Supp. 1134, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297. All the judges who sat in this court united with Judge Gray in saying that 'public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employment and capacities. It would, to use the language of Mr. Justice Barrett in People v. Smith, 5 N. Y. Cr. Rep. 513, "impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate."'

"The plaintiff, in a very recent case in England, employed non-union men, and after trying in vain to have them admitted to the union, was told by its president that unless he discharged them his meat would be stopped at one Munce's, who had been getting about thirty pounds' worth weekly from him for twenty years, although there was no permanent contract between them. Upon his refusing to discharge, the defendants, who were officers and members of the union, threatened to instruct Munce's employés to cease work unless he complied with their request. The plaintiff still refused, whereupon Munce informed him that he need not send any more meat unless he arranged with the union, as his men had been ordered to quit work, and thereupon Munce ceased to deal with him. There was a recovery by the plaintiff, which was sustained by all the appellate courts: Leathem v. Craig, 2 Ir. Rep. [1899] 667; Quinn v. Leathem, [1901] App. Cas. 495. Five concurring opinions were written in the house of lords, which unanimously held that 'a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, or continue in his employment, is, if it results in damage to him, actionable.'

"The earlier case of Allen v. Flood, [1898] App. Cas. 1, upon which the appellate division relied in rendering the judgment now before us, was carefully limited and explained, if not virtually overruled.

"The English cases were so thoroughly reviewed that it is unnecessary to make further reference to them. Among other things, it was said: 'He [referring to the plaintiff] was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is unlawful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact, in other words, if he is wrongfully and intentionally struck at through others and is thereby damnified, the whole aspect of the case is changed; the wrong done to others reaches him, his rights

are infringed, although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances.' This decision was not founded upon ancient statutes, as some of the early English cases are, but upon the common law. See, also, the opinion in Taff Vale Ry. Co. v. Amalgamated Soc., [1901] App. Cas. 431, which had not been published when the judgment in Quinn v. Leathem was pronounced.

"The position of the federal courts and those of most of the states is to the same effect: Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; Casey v. Cincinnati Typographical Union, 45 Fed. 135; Hopkins v. Oxley Stave Co., 83 Fed. 916; In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900; Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 38 Pac. 547; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Crump v. Commonwealth, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Doremus v. Hennessy, 62 Ill. App. 391; State v. Huegin, 110 Wis. 189, 85 N. W. 1046; Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; Lucke v. Clothing Cutters etc., 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505; Murdock v. Walker, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13.

"I add to the discussion of the common law governing the subject a quotation from the statute against crimes in this state, as indicating the policy of the law: 'If two or more persons conspire to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property, belonging to or used by another, or with the use or employment thereof, ... each of them is guilty of a misdemeanor': Pen. Code, sec. 168.

"I think that the action of the defendants was unlawful and was properly restrained, but the injunction in the form granted is too broad and requires modification. It prevents the defendants 'from coercing or obtaining by command, threats, strikes or otherwise the dismissal or discharge by any employer, contractor or owner, of the members of the plaintiff corporation,' etc. It is not limited to coercion, but prevents the defendant from obtaining not simply by command, threats, etc., but by any means, the discharge of the plaintiffs. This might prevent fair persuasion or solicitation, which the defendants may resort to. While this might have been corrected by motion at special term, for the decision of the trial justice does not warrant it, it may be corrected upon appeal.

"The order of the appellate division so far as appealed from should be reversed and the judgment of the special term modified by striking out the words 'or otherwise' therefrom, and as modified affirmed, with costs to the appellant in all courts.

"O'Brien, Haight, JJ. (and Gray, J., in memorandum), concur with Parker, C. J.

"Bartlett and Martin, JJ., concur with Vann, J.

"Ordered accordingly."

Combinations of Labor or in the interest of labor are discussed in the monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 264-268; and strikes and strikers are considered in the monographic note to O'Neil v. Behanna, 61 Am. St. Rep. 706-711. See, also, the recent cases of Flaccus v. Smith, 199 Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 894; Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011; Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. The general rule is, that employés have the right to combine in unions to fix their wage rate, and employers have a right to combine and fix a rate they are willing to pay; but both must act in a peaceable way, with no attempt at coercion or intimidation: Beck v. Railway etc. Union, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13.

AMOTRONO v. DOWNS.

[170 N. Y. 388, 63 N. E. 340.]

WILLS.—A DEVISE BECOMES INOPERATIVE IF THE TESTATOR PARTS WITH THE TITLE to the property in his lifetime, and it is not material that this parting was involuntary, as where the property was taken by condemnation proceedings, though the proceeds, or the greater part thereof, remained in the possession of the testator at the time of his decease. (p. 673.)

John M. Rider, for the appellant.

Alfred D. Lind and Joseph Kaufmann, for the respondents.

390 CULLEN, J. On August 7, 1884, Margaret Shelley, now deceased, received by conveyance from her husband, through an intermediary, an undivided one-half in the premises known as No. 22 Oliver street, in the city of New York. On March 12, 1891, she executed the following will:

"I, Margaret Shelley, of the City, County and State of New York, being of sound disposing mind and memory, do hereby make, publish and declare this to be my last will and testament.

"*First.* I order and direct my funeral expenses to be paid as soon as shall be convenient after my decease.

"*Second.* I give, devise and bequeath my one-half interest in the building known as No. twenty-two (22) Oliver street, in the Fourth Ward of the City of New York, unto my daughter Lizzie, wife of Emanuel Amotrono, of the City of Brooklyn, County of Kings, State of New York, and to her heirs and assigns forever.

"I nominate, constitute and appoint Patrick J. Murphy, of the City of New York, and Charles Henry Hawkins, of the same place, or either of them, as executor of this my last will and testament.

391 "In witness whereof, I have hereunto set my hand and seal this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-one."

In 1896 condemnation proceedings were taken by the city of New York to acquire said No. 22 Oliver street as a site for the erection of a schoolhouse. To these proceedings Margaret Shelley was not made a party. The net amount of the award, after the satisfaction of the encumbrances on the property, amounting to nine thousand eight hundred dollars, was, in February, 1897, paid to her husband, Michael Shelley, who thereupon deposited one-half of the award, four thousand nine hundred dollars, in the Washington Trust Company to the credit of his wife as her share of the property. In 1898 Margaret Shelley drew the accrued interest on the deposit and four hundred dollars on account of the principal. She died in February, 1899, leaving an estate consisting entirely of personalty. The plaintiff is the devisee named in the will, as well as the administrator of the estate of the deceased, and in this action, which is for a settlement of her accounts, claims that she is entitled under the will to the fund received by the testator in the condemnation. She has been defeated in this claim by both the courts below, and now appeals to this court.

The able opinion of the learned appellate division deals so fully with the question in dispute that there remains but little to be added by us. Had the deceased voluntarily alienated her property by deed, it is entirely clear, under the authorities in this state, that the devisee would have no claim to the proceeds of the sale: Adams v. Winne, 7 Paige, 97; Beek v. McGillis, 9 Barb. 35; Gilbert v. Gilbert, 9 Barb. 532; Vandemark v. Vandemark, 26 Barb. 416; Philson v. Moore, 23 Hun, 152; McNaughton v. McNaughton, 34 N. Y. 201. "If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court

can substitute the money received by the testatrix for the land devised." In Adams v. Winne, 7 Paige, 97, and Beck v. McGillis, 9 Barb. 35, the testator had taken back a mortgage on the devised land as security for the purchase money, yet it was held that the devisee was not entitled [392] to the mortgage. The only point to be considered, therefore, is whether a different rule obtains in the case of involuntary alienation, by operation of law, from that which prevails on a voluntary sale. Mr. Jarman asserts that the rule is the same in both cases, and the English decisions cited by him sustain the doctrine of the text: Jarman on Wills, 163.

We see no such difference between a voluntary and an involuntary sale of the devised land as justifies a distinction in principle in the application of the rule that where the testator has parted with the subject of the devise, all claim of the devisee is lost. While there is no authority on the point in this state (there is said to be none in the country), the question presented is not without analogy in the rule which determines in cases of intestacy the character of the proceeds of sales by operation of law, whether they are to be considered as real or personal property. It is settled by a number of authorities that if the sale be made by execution or judicial decree in the lifetime of the intestate, the proceeds are personalty and go to the next of kin, while if made after his death they are real estate, and go to the heirs at law (Graham v. Dickinson, 3 Barb. Ch. 169; Denham v. Cornell, 67 N. Y. 556), except where the property belongs to an infant or to an incompetent person, in which case the proceeds retain their original character of realty: Sweezy v. Thayer, 1 Duer, 286; Horton v. McCoy, 47 N. Y. 21.

It is urged by the learned counsel for the appellant that the condemnation proceedings did not effect the revocation of the will, because there was no "other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed" (2 Rev. Stats. 64, sec. 42), nor any settlement, deed, or other act by the testator: 2 Rev. Stats., sec. 47. It may be conceded that there was no revocation of Mrs. Shelley's will, though I very much doubt whether the deceased was not devested of title by her own voluntary act. As she was not a party to the condemnation proceedings, they were without force or effect as to her. If she lost her title it was because, by her voluntary [393] acceptance of the award, she estopped herself from claiming the property. Be this as it may, the case does not

fall within the statute of wills. A specific devise or specific legacy may not be revoked, but unless the property devised or the thing bequeathed is found in the estate of the testator at the time of his decease, the will is, necessarily, inoperative. The testatrix could not devise to the appellant an undivided half of the premises No. 22 Oliver street, for she did not own it at her decease, and the question here presented is not whether the devisee shall receive the property devised, but whether she shall receive the fund which proceeded from the condemnation of that property. With this latter question the statute of wills does not deal. It does not provide affirmatively that a conveyance or other disposition of bequeathed or devised property shall render the will in that respect ineffective; it assumes that principle, and in sections 45, 46 and 47 merely limits the operation of the rule by providing that in three cases, to wit, an executory contract, an encumbrance or mortgage and a conveyance or deed altering the testator's estate, but not wholly devesting his title, the devise shall be revoked only pro tanto. As said by the chancellor in Adams v. Winne, 7 Paige, 97, it left unchanged the existing law "that when the testator had converted real estate, which he had devised as such, into personalty, or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of the will or an ademption of the bequest." The correctness of this doctrine has never been challenged.

The judgment appealed from should be affirmed, with costs to both parties payable out of the estate.

Bartlett, Martin, Vann and Werner, JJ., concur.

Parker, C. J., and Haight, J., take no part.

To Make a Devise of Land Effectual, the testator must not only be actually seised thereof, but continue seised to the time of his death: Minuse v. Cox, 5 Johns. Ch. 441, 9 Am. Dec. 313. Therefore if he conveys the land devised, the conveyance operates as a revocation of the devise: Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187; monographic note to Graham v. Burch, 28 Am. St. Rep. 357.

CASES

IN THE

SUPREME COURT

OF

NORTH DAKOTA.

KUHNERT v. ANGELL.

[10 N. Dak. 59, 84 N. W. 579.]

AGENT'S LIABILITY FOR UNSAFE PREMISES.—An agent is not answerable to a trespasser for the unsafe condition of premises of which he is not in possession and as to which his authority is limited to leasing and collecting rents. (pp. 675, 678.)

SUBAGENT.—AN AGENT IS NOT RESPONSIBLE for the negligence or want of skill of a subagent whose employment was necessary and in whose selection he used reasonable diligence. (p. 678.)

AGENT'S LIABILITY FOR UNSAFE FENCE.—An agent who leases land and collects the rents for the nonresident owner is not liable for the unsafe condition of a fence on the property which his principal instructs him to have built and which is constructed by a subagent. (pp. 675, 678.)

FENCES—LIABILITY FOR THEIR CONDITION.—WHILE BARBED WIRE may lawfully be used for fencing, conditions may exist which render its use dangerous and the persons responsible for its construction or condition liable for resulting damages. (p. 679.)

John E. Greene, for the appellant.

C. E. Bradley and Arthur B. Lee, for the respondent.

59 YOUNG, J. Plaintiff is seeking to recover damages for injuries to a team of horses, received on the night of July 13, 1898, in a barbed-wire fence, while being driven from Harwood to Fargo. The fence in question inclosed a tract of meadow land, and had been but recently built. It consisted of three strands of barbed wire, and was built directly across a trail which had been traveled by the public for a considerable time. The injury occurred while the team was following this trail.

The case has been tried twice in the district court, and this is the second appeal to this court. At the first trial plaintiff sought to recover under section 7550, Revised Codes, which provides that "every person who shall knowingly [60] and willfully build or place a barbed-wire fence across any well-traveled trail, which has been the usual and common route of travel for not less than one year prior to the commission of the offense, without placing on the outside of the top tier of barbed wire on said fence, a board, pole, or other suitable protection, to be at least sixteen feet in length, shall be guilty of a misdemeanor, ... and shall be liable for all damages to person or property by reason of the same." Plaintiff prevailed and recovered a verdict. Subsequently, however, defendant moved for a new trial. This was granted by the trial court, and the order granting it was affirmed by this court: See Kuhnert v. Angell, 8 N. Dak. 198, 77 N. W. 1015. When the case went back to the district court, plaintiff obtained leave to amend his complaint. He now seeks to recover entirely independent of the liabilities imposed by said section 7550, supra, and upon the express ground that defendant was guilty of negligence in connection with the construction of the alleged dangerous obstruction.

The complaint alleges "that on or about the first day of July, A. D. 1898, the defendant negligently and carelessly constructed, or caused to be constructed, across said road a barbed-wire fence, substantially built, with three cedar posts set in the ground, and three strands of wire securely fastened thereto, and he negligently and carelessly failed and neglected to place any guards upon either side of said fence, or any obstruction of any kind in said highway, on either side of said fence, or provide any means whatever to notify the persons traveling said highway of the existence of said fence, or the danger that existed by reason thereof; that said fence, so constructed as aforesaid, without any protection or means provided for warning travelers, rendered the travel of said highway dangerous, and persons and teams traveling thereon were liable to be seriously injured by said fence, all of which the defendant well knew." At the close of the case a verdict was directed for defendant on the ground that the evidence failed to show negligence on the part of the defendant. Judgment was entered in defendant's favor, and plaintiff appeals therefrom.

The only error assigned which we deem it necessary to consider is the order directing a verdict for defendant. Our inquiry, then, is as to whether there was any evidence before the jury

tending to establish actionable negligence on the part of the defendant. On this point we may say that the evidence differs in no important particular from that contained in the record on the former appeal. The land on which the fence in question was located was owned by one Hunt, a nonresident. It was without buildings or other substantial improvements. Defendant is in the real estate business in the city of Fargo. For several years he had been Hunt's agent for leasing said land and collecting the rent. Some time in 1898 Hunt instructed defendant to have the fence in question constructed for the purpose of inclosing a portion of the meadow land. Hunt's plans for the fence corresponded with the fence actually built, with the single exception as to guard rails. Guard rails were to be [61] provided where it crossed the trail where the accident occurred. In pursuance of such request defendant employed one Stenso to build the fence; and his instructions to the latter covered the building of a fence in every way corresponding with the directions of his principal, and including the provision for guard rails. Stenso constructed the fence, but, in violation of his contract, and also of express direction from defendant, failed and neglected to provide guard rails or any other means of warning the traveling public of danger where the fence crossed the trail in question. It will be seen that defendant did no affirmative act in creating the alleged dangerous obstruction. He neither constructed it nor caused its construction. His entire connection with the erection of the fence was limited to his employment of Stenso, and the purpose of that employment was the construction of a lawful fence, with guard rails. These considerations compelled us to hold on the former appeal that the defendant was not liable under the statute, viz., section 7550, supra; for, under the undisputed evidence, he did not knowingly and willfully place, or caused to be placed, across the trail the alleged dangerous obstruction. The willful act was that of Stenso alone. Neither do we reach a different conclusion on the present appeal, wherein defendant's liability is predicated upon negligence. The theory of appellant's counsel is that defendant's agency was broad enough to render him personally responsible for the safe condition of the premises, and accordingly liable for injuries suffered through an unsafe condition thereof. In support of this rule of liability the following cases are cited: Baird v. Shipman, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384; Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620; Campbell v. Portland Sugar Co., 62 Me. 552, 16

Am. Rep. 503. The doctrine of these cases is expressed by the court in Baird v. Shipman, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384, in the following language: "An agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the neglect of said agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another."

The facts in the case at bar do not bring defendant within the rule of liability as laid down in the foregoing cases, for several reasons: 1. The rule as laid down is applicable to buildings which are under the exclusive control of agents who are charged with the duty of attending to repairs, whereas the property here involved is unoccupied land; 2. In the case under consideration the defendant did not have complete control and management of the premises. His authority was limited to leasing and collecting rent, and did not extend to making improvements, such as building the fence in question. The cases differ, also, in this: that in each of these cases the person claiming damages for injuries was either a [62] tenant or person lawfully on the premises, to whom a duty was expressly due, whereas in the present case the defendant was a trespasser at the time of the injury. Under the facts of this case, it is clear that defendant's general relation to the premises did not make him responsible to either his principal or to third persons for their safe condition.

The only remaining question, then, is whether defendant, by reason of having employed Stenso, is responsible for his negligence. This must be answered in the negative. The general rule of law is that an agent is not responsible for the negligence or want of skill of a subagent employed by him, where such employment was necessary to the transaction of the business intrusted to him, and he has used reasonable diligence in his choice as to the skill and ability of the subagent: Tiernan v. Commercial Bank, 7 How. 648, 40 Am. Dec. 83; Baldwin v. Bank of Louisiana, 1 La. Ann. 13, 45 Am. Dec. 72; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206.

In Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364, the court said that the principle which runs through the cases is that if an agent employs a subagent for his principal,

and by his authority, express or implied, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the subagent, the agent is only responsible for a want of due care in selecting the subagent. The doctrine of these cases is also embodied in the statutory law of this state. Section 4348 of the Revised Codes provides that "a subagent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the subagent." The rule of law embraced in the section just quoted exonerates defendant from liability. He had authority to employ someone to build the fence. The work to be done was of the commonest kind, and did not require skill or peculiar fitness, and in employing Stenso he intrusted the erection of the fence to a person competent for the purpose of his employment. That was the extent of his duty, and, there being no breach of duty to his principal or to the public, he cannot be charged with negligence.

We have not found it necessary to determine whether the construction of the fence in question was, under the peculiar circumstances of this case, actionable negligence, so as to render those legally responsible for its condition liable for damages caused thereby. Our decision is confined to the single question of defendant's liability, and we have assumed, merely for the purposes of this case, but without deciding the question, that the construction of the fence in the place and manner narrated constituted actionable negligence. The cases are numerous, however, holding that, while barbed wire may be lawfully used for fencing purposes, nevertheless conditions may exist which render its use dangerous, and render the persons responsible for its construction or neglected condition liable for damages resulting therefrom: Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559; Sisk v. Crump, 112 Ind. 504, [63] 2 Am. St. Rep. 213, 14 N. E. 381; McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; Lowe v. Guard, 11 Ind. App. 472, 54 Am. St. Rep. 511, 39 N. E. 428; Gould v. Bangor etc. R. R. Co., 82 Me. 122, 19 Atl. 84; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766. Also, 12 Am. & Eng. Ency. of Law, 2d ed., 1039, and cases cited. The judgment of the district court is affirmed.

All concur.

An Agent is Liable for the unsafe condition of premises when he has the complete control and management thereof: Baird v. Shipman, 132 Ill. 16, 22 Am. St. Rep. 504, and note, 23 N. E. 384.

See, also, Mayer v. Thompson etc. Bldg. Co., 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620.

An Agent is not Liable for the negligence of a subagent, if the employment of such subagent has been authorized, if he uses reasonable skill and diligence in his choice of the subagent: See the monographic note to Davis v. King, 50 Am. St. Rep. 121.

Fences.—An owner of land is not liable for damages resulting from a barbed-wire fence thereon, from the mere fact of constructing it: Note to Lowe v. Guard, 54 Am. St. Rep. 514. But he is liable if he negligently constructs or maintains it in a dangerous condition: Sisk v. Crump, 112 Ind. 504, 2 Am. St. Rep. 213, 14 N. E. 381; Siglin v. Coos Bay etc. Co., 35 Or. 79, 76 Am. St. Rep. 463, 56 Pac. 1011.

REYNOLDS v. STRONG.

[10 N. Dak. 81, 85 N. W. 987.]

CHATTEL MORTGAGE.—THE FUTURE EARNINGS OF A THRESHING RIG may be the subject of a chattel mortgage. (p. 681.)

CHATTEL MORTGAGE OF EARNINGS OF THRESHING RIG.—THE DESCRIPTION, in a chattel mortgage, of the future earnings of an engine and separator, is sufficient though it does not designate their numbers, if it states their size and power, the names of the manufacturer and the owner and operator, the county where they are to be operated, and the time in which, and the place where, the earnings are to accrue. (p. 682.)

CHATTEL MORTGAGE.—THE DESCRIPTION in a chattel mortgage is sufficient, if it will enable third persons to identify the property, when aided by such inquiries as the instrument suggests. (p. 682.)

A CHATTEL MORTGAGE OF THE FUTURE EARNINGS OF A THRESHING RIG is not void, because the persons against whom the earnings are to accrue are not named. (p. 682.)

Coger & Creswell, for the appellant.

Burke & Vick, for the respondent.

83 YOUNG, J. The single question presented for determination on this appeal is the validity of a certain chattel mortgage upon the future earnings of a threshing rig. Plaintiff is the owner of the mortgage by assignment. The mortgagor did threshing for the defendant during the threshing season of 1899. The amount of his threshing account was one hundred and twenty-five dollars and fifty cents. The plaintiff seeks to recover thereon, and bases his right thereto upon the mortgage in question. The defense attacks the validity of the mortgage, and payment of the account is alleged. The mortgage in ques-

tion was duly filed in the office of the register of deeds of Pembina county, wherein the threshing rig was situated and operated, and where the above account accrued. In addition, the defendant had actual notice of the existence of the mortgage prior to making payment. The case was tried in the district court without a jury. Plaintiff prevailed. Defendant appeals, and requests a trial de novo in this court.

The evidence upon which the case was submitted in the trial court consisted of a written stipulation of facts, none of which are in dispute, and no further reference to them is necessary. Confessedly, the entire case hinges on the question of the validity of the chattel mortgage. If it is valid, the plaintiff is entitled to recover; otherwise not. The opinions of the courts as to the validity of mortgages of future earnings are not in harmony. In this jurisdiction, however, the question is settled in favor of the validity of such mortgages. In Sykes v. Hannawalt, 5 N. Dak. 335, 65 N. W. 682, this court held that "it is competent for the owner and operator of a threshing rig to mortgage the future earnings thereof." In reaching that conclusion the court was largely controlled by the statute authorizing the creation of liens upon after-acquired property: Comp. Laws, sec. 4328; Rev. Codes, sec. 4680. The Iowa rule, also, is that future earnings may be the subject of a valid chattel mortgage: See Sandwich Mfg. Co. v. Robinson, 83 Iowa, 567, 49 N. W. 1031, and note. The contention of defendant in this case is not that such mortgages are invalid because upon after-acquired property, but that this particular mortgage is void "because the description of the subject matter thereof is vague and uncertain." It is urged that the failure to give the numbers of the engine and separator is a fatal omission, rendering the description of the threshing rig, from the operation of which the earnings mortgaged were to accrue, entirely insufficient. This objection is not well founded. The description in a mortgage is for the purpose of identifying the property, and the sufficiency thereof must be determined by the character of the property sought to be included in the mortgage. It [84] does not appear that either the engine or the separator had numbers, and that it was possible to so describe them; but, however that may be, they were sufficiently described otherwise. The separator is described as "one Gaar Scott 40x58 separator, complete, Shop No. ———," and the engine as "one Buffalo Pitts 16 H. P. traction portable engine complete, Shop No. ———." The name of the owner and operator is given, and the county of Pembina and

state of North Dakota are named as the place where it is to be operated, and where the earnings mortgaged are to accrue. No doubt, the insertion in the mortgage of the numbers of the engine and separator, if they were numbered, would have made the description more certain. But the description given in the mortgage was in itself, in our judgment, entirely sufficient to enable third persons to identify the property, when aided by such inquiries as were suggested by the mortgage itself, and that is all that is required: 5 Am. & Eng. Ency. of Law, 2d ed., 956. As was said by this court in Union Nat. Bank v. Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034: "Whenever a description is challenged as insufficient, we are to inquire whether the creditor, after inspecting the instrument, and aided by the inquiries it suggests, could ascertain what property was intended to be mortgaged." As to this mortgage, as we have seen, the data contained in it made certain the ascertainment of the property intended to be covered by it.

It is further contended that the mortgage is void "because the persons against whom the earnings are to accrue" are not named. This contention seemingly has support in the language of the majority opinion in Sandwich Mfg. Co. v. Robinson, 83 Iowa, 567, 49 N. W. 1031, and also in Minneapolis etc. Machine Co. v. Skau, 10 S. Dak. 636, 75 N. W. 199. An examination of these cases, however, discloses that there were other and controlling grounds for the decisions, and we are not entirely satisfied from the language used by the learned courts that they meant to hold that it is essential to the validity of a mortgage upon the future earnings of a threshing rig that the persons against whom they are to accrue should be actually named. However that may be, such is not our view. We have held that future earnings may be mortgaged. It is not possible to state in advance who the persons are who will owe the accounts. To impose such a statement is to require the impossible. As stated by Beck, J., in his dissenting opinion in Sandwich Mfg. Co. v. Robinson, 83 Iowa, 567, 49 N. W. 1031: "The opinion defeats the rights of the holder of the mortgage upon a ground which could not have been provided against." The mortgage under consideration specified the threshing outfit from which the mortgaged accounts were to accrue by naming the manufacturers of both the engine and separator. It named the owner and operator of the rig, and designated the period of time when, and the place where, the accounts were to accrue. A more complete description of future earnings does not seem possible, and

in this respect we therefore hold the mortgage is not open to the objection made. The mortgage involved in this case differs in many respects from the one considered in [85] Sykes v. Hannawalt, 5 N. Dak. 335, 65 N. W. 682. That case turned upon the fact that the mortgage had not been filed. It is true the court in its opinion in that case said that "the following description, to wit: 'All and singular the earnings of the aforesaid rig,' would not cover the earnings of the men and teams." The language quoted was not necessary to a decision of the question involved in that case. However, it has no application to the case at bar, for there is no controversy as to what the mortgage we are considering covered. Counsel for appellant, in his brief, after reviewing its various provisions, correctly states that it covers "all the threshing accounts, and the whole thereof." The element of uncertainty which may have existed in the Sykes case as to the portion of the threshing accounts mortgaged is not in this case. Judgment affirmed.

All concur.

In a Chattel Mortgage that Description is sufficient which will enable third persons, aided by such inquiries as the instrument itself suggests, to identify the property: Davis v. Pitcher, 97 Iowa, 13, 59 Am. St. Rep. 392, 65 N. W. 1005; Andregg v. Brunskill, 87 Iowa, 351, 43 Am. St. Rep. 388, 54 N. W. 135. This rule, however, has little application to mortgages of growing crops: Commercial State Bank v. Interstate Elev. Co., 14 S. Dak. 276, 86 Am. St. Rep. 760, 85 N. W. 219. See the monographic note to Barrett v. Fisch, 14 Am. St. Rep. 239-247, as to the sufficiency of the description in chattel mortgages. And consult, also, the recent cases of First Nat. Bank v. Ragsdale, 158 Mo. 668, 81 Am. St. Rep. 332, 59 S. W. 987; Wattles v. Cobb, 60 Neb. 403, 83 Am. St. Rep. 537, 83 N. W. 195.

A Chattel Mortgage may be made on property not yet in existence or of property yet to be acquired: Hall v. Glass, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336; Commercial State Bank v. Interstate Elev. Co., 14 S. Dak. 276, 86 Am. St. Rep. 760, 85 N. W. 219; Bidgood v. Monarch Elev. Co., 9 N. Dak. 627, 81 Am. St. Rep. 604, 84 N. W. 561; monographic notes to Gregg v. Sanford, 76 Am. Dec. 728-733; Moody v. Wright, 46 Am. Dec. 712-718.

Future Earnings may be the subject of a valid assignment: Robinson v. McKenna, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510. But see Steinbach v. Brant, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651. Sales of property not in existence are considered in the monographic note to Forsyth Mfg. Co. v. Castlen, 81 Am. St. Rep. 42-46.

GRANDIN v. EMMONS.

[10 N. Dak. 223, 86 N. W. 723.]

ASSIGNMENT OF MORTGAGE WITHOUT THE STATE—PROOF OF.—An assignment of a mortgage, executed and acknowledged in another state before a notary, is admissible in evidence in this state, without having attached thereto a certificate of some officer of higher rank to the official character and signature of the notary. (p. 686.)

NOTARY'S SEAL—HOW PROVED.—Courts take judicial notice of the seal of a notary, and it proves itself prima facie by its appearance upon a certificate. (p. 686.)

A NOTICE OF MORTGAGE FORECLOSURE PUBLISHED once each week for six successive weeks before the sale is a sufficient compliance with the statutes of North Dakota. (p. 687.)

POWER OF SALE—DEATH OF MORTGAGOR.—A power of sale in a mortgage is a power coupled with an interest, and is not suspended or terminated by the death of the mortgagor. A foreclosure thereunder, by advertisement, is effectual against his heirs. (pp. 687, 689.)

F. W. Ames, for the appellant.

M. A. Hildreth, for the respondents.

224 YOUNG, J. Action to recover the possession of real estate and to quiet and confirm the title thereto. The real estate in controversy comprises one hundred and sixty acres, situated in Traill county. The defendants are in possession under a claim of title. Plaintiff alleges that he is the owner of said land, and that defendants have no right, title, or interest therein. The case was tried to the court without a jury. No evidence was offered by the defendants. At the close of plaintiffs' testimony, at the request of defendants' counsel and on his motion, findings of fact and conclusions of law were made adverse to plaintiff's claim of title. Judgment was thereafter entered declaring certain transfers, upon which plaintiff bases his claim of title void and of no effect Plaintiff appeals from the judgment, and requests a review of the entire case in this court.

It is a stipulated fact that on December 1, 1885, Gunder G. Emmons was the owner of the land in controversy, and it is from this common source that both parties to this action claim the title they rely upon. Plaintiff sets forth his claim of title as follows: He alleges that on December 1, 1885, Gunder G. Emmons and Ingeborg G. Emmons, his wife, executed and delivered a mortgage covering said land to one Hiram D. Upton, to secure their joint note for seven hundred dollars, payable to

said Upton, of even date with said mortgage; that on June 1, 1894, said Upton assigned said note and mortgage to one R. C. Alexander, by an instrument in writing; that said mortgage [225] contained a provision authorizing the mortgagee, his heirs and assigns, in case of default in payment of said debt or interest thereon, "to sell said premises at public auction, and convey the same agreeable to the statutes in such case made and provided"; that, pursuant to a default in payment of the debt so secured, the said Alexander foreclosed said mortgage by advertisement, causing the notice of sale to be published in a weekly newspaper "six times, once in each week, for six successive weeks," which notice so published fixed the time of sale on June 13, 1896, at 2 o'clock P. M.; that on said date said premises were sold to R. C. Alexander, and a sheriff's certificate of sale duly issued to him; that thereafter, to wit, on June 18, 1897, no redemption having been made, a sheriff's deed was duly issued to the said Alexander, the purchaser at said sale; that thereafter, to wit, on June 21, 1897, the said Alexander conveyed said premises to the plaintiff by executing and delivering to him a warranty deed therefor. All of the instruments above referred to were duly recorded in the proper office.

It is apparent that, if the foreclosure proceedings and the several conveyances are valid, plaintiff's title is perfect, and he is entitled to the relief he demands. The defendants do not claim title or right of possession by virtue of any conveyance. Their rights, if any they have, rest solely upon the fact that they are the heirs at law and next of kin of Ingeborg G. Emmons, who died prior to the foreclosure proceedings hereinbefore referred to. At the time of the execution of the mortgage, and up to the time of her death, she occupied the land in question with her husband as their homestead, and since her death the defendants have continued to so occupy it. One of the defendants, Peter Emmons, is still in his minority. The facts placed in issue by the answer are few, and require but brief mention.

The execution of the mortgage by Ingeborg G. Emmons is denied; also the assignment of the note and mortgage from Upton to Alexander. An examination of the evidence transmitted to this court leaves no doubt in our minds that the mortgage was executed by her, and that it was assigned to Alexander by Upton, as alleged in the complaint. The execution of the mortgage is satisfactorily shown by the testimony of one of the persons who witnessed its execution, and by the certificate of the notary public attached thereto, certifying to the acknowledgment of its

execution by the mortgagors before such notary public. The transfer of the note and mortgage to Alexander is established by the introduction in evidence of the original written assignment, executed by Upton and duly acknowledged by him before a notary public, which acknowledgment is certified to by the notary public over his official signature and seal. Objection was made to the admission of this instrument on the ground that it is incompetent, and that no foundation was laid for its introduction. The particular ground of objection is that the [226] instrument having been executed and acknowledged in New Hampshire before a notary public of that state, it is necessary to have attached thereto the certificate of some other officer of that state of higher official rank, certifying to the official character and signature of such notary public, before the same can be held to be an acknowledged instrument, within the meaning of the statutes of this state. The objection is not well taken. Sections 3573, 3575, 3576 of the Revised Codes authorize the proof or acknowledgment of instruments to be made before a notary public, within this or any other state or foreign country. The authentication of the certificate of acknowledgment taken by a notary public is prescribed by section 3586 of the Revised Codes, which provides that the certificate shall be authenticated by the signature and official seal of the officer. Aside from these express statutory provisions, it is a well-settled rule of law that "courts will take judicial notice of the seal of a notary public, and it proves itself prima facie by its appearance upon the certificate": Green v. Gross, 12 Neb. 117, 10 N. W. 459, and cases cited on page 124, 12 Neb., and page 461, 10 N. W.; Hoadley v. Stephens, 4 Neb. 431; Galley v. Galley, 14 Neb. 174, 15 N. W. 318; Southern v. Mendum, 5 N. H. 420. The assignment was accordingly acknowledged, within the meaning of section 5696 of the Revised Codes, and, under the authority of said section, was entitled to be read in evidence without further proof. No further facts are in dispute. The questions which remain for consideration relate to the alleged invalidity of the foreclosure proceedings, and the legal effect of the foreclosure, if valid, upon the rights of the heirs of Ingeborg Emmons, deceased.

It was urged at the trial in the district court that the entire foreclosure proceedings were void, and that the sheriff's deed issued to Alexander pursuant thereto, and the deed of the latter to plaintiff conveyed no title, for the reason that "the publication of the notice of mortgage sale is insufficient to comply with

the statutes in this, to wit, that the publications occurred on May 7, 1896, May 14, 1896, May 21, 1896, May 28, 1896, June 4, 1896, and June 11, 1896, and the sale took place on June 13, 1896, being a period of only thirty-seven days." The foregoing quotation from the language of the order of the trial judge correctly states the facts as to the publication of the notice and date of sale, and gives the sole ground relied upon by the trial court in rendering the judgment appealed from. The case was decided before our decision was announced in the case of McDonald v. Nordyke Marmon Co., 9 N. Dak. 290, 83 N. W. 6, wherein for the first time a construction was placed upon section 5848 of the Revised Codes, which governed the publication of the notice of mortgage sale now under consideration. In that case the statute now in force—namely, section 5848—was distinguished from the antecedent provisions found in section 5414 of the Complied Laws, under which Finlayson v. Peterson, 5 N. Dak. 587, 57 Am. St. Rep. 584, 67 N. W. 953, was decided, and was construed to only require a publication of the notice of sale six times, once in each [227] week for six successive weeks, prior to the date of sale, instead of a period of forty-two days, as under the former enactment. In McDonald v. Nordyke Marmon Co., 9 N. Dak. 290, 83 N. W. 6, we said: "Under the present law, the notice is required to be published before the sale 'six times, once each week, for six successive weeks.' When this is done, there need be made no perplexing computations of days or weeks." No reasons are advanced by counsel for respondents, and none have occurred to us, for questioning the entire soundness of that construction. It follows, therefore, that the trial court was in error in holding the foreclosure proceedings invalid. The notice was published in strict conformity to the statute governing such publication.

It is also earnestly urged by respondents' counsel that, notwithstanding the regularity and validity of the foreclosure proceedings, they are ineffectual against minors and heirs of the mortgagors, because it is a foreclosure by advertisement, and they are not parties to the record, and that it does not, therefore, cut off their right to redeem. This contention is based upon the theory that the power of sale contained in the mortgage authorizing the mortgagee, his heirs and assigns, to sell the land described in the mortgage, pursuant to the statute regulating the manner of exercising the right so conferred, was merely a naked power, one not coupled with an interest, and that it was therefore revoked by the death of Ingeborg Emmons, one

of the mortgagors, and that, therefore, as to the heirs of said Ingeborg Emmons, the foreclosure is without effect. A large array of cases is presented by counsel as supporting this position. All but two of them relate to foreclosure by action wherein necessary parties were omitted. It is, of course, well settled that such persons are not cut off by such a foreclosure and upon elementary principles. None of these cases have reference to the effect of a statutory foreclosure under a power of sale, and are not in point. Johnson v. Johnson, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606, and Wilkins v. McGehee, 86 Ga. 764, 13 S. E. 84, however, squarely hold that a power of sale in a real estate mortgage cannot be exercised after the death of a mortgagor, and that a sale made thereafter does not cut off the rights of the heirs at law of the mortgagor. The express ground of these decisions is that the power of sale in those states is not a power coupled with an interest, and is therefore revoked and rendered incapable of execution by the death of the mortgagor. In holding that the power of sale was not coupled with an interest, and so expired at the death of the mortgagor, it would appear that the courts in the cases just cited were largely controlled by the fact that in those states there was "no statute recognizing or declaring the effect or providing a method for the execution of the power. It could be executed only as any other power of attorney in the name of the principal." But, however that may be, the almost unanimous voice of authority is the other way. 2 Perry on Trusts, section 602, states that "it is a universal rule that a power coupled with an interest is irrevocable, and, as to a power of sale inserted in a mortgage, ... [228] it is a power coupled with an interest, and it cannot be revoked by any act of the donor or grantor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them." The doctrine just stated, that neither death nor disability will suspend or terminate the power, is supported by the following cases: Conners v. Holland, 113 Mass. 50; Varnum v. Meserve, 8 Allen, 158; Hudgins v. Morrow, 47 Ark. 515, 2 S. W. 104; Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234; Jones v. Tainter, 15 Minn. 512; Encking v. Simmons, 28 Wis. 272; Meyer v. Kuechler, 10 Mo. App. 371; Van Meter v. Darrah, 115 Mo. 153, 22 S. W. 30; Berry v. Skinner, 30 Md. 567. In support of the doctrine that the power of sale is a beneficial power coupled with an interest, see Jencks v. Alexander, 11

Paige, 624; Wilson v. Troup, 2 Cow. 195, 14 Am. Dec. 458; Anderson v. Austin, 34 Barb. 319; King v. Duntz, 11 Barb. 191; George v. Arthur, 2 Hun, 406; Cole v. Moffit, 20 Barb. 18. In this jurisdiction the doctrine of these cases has been recognized, and to some extent embodied, in the following sections of the statute: Section 4710 declares that the power of sale in a mortgage is a trust; and section 3419 declares that it is a part of the security, and vests in the person entitled to the security. Section 3403 distinguishes it from a simple power of attorney to convey real property in the name of the owner. Section 4350, which provides that the power of an agent shall be terminated by revocation, death, or incapacity, expressly excepts powers coupled with an interest in the subject of the agency. Section 5844 provides that "every mortgage of real property containing a power of sale may, upon default being made in the conditions of such mortgage be foreclosed by advertisement," etc. That no limitation is in fact placed upon the exercise of the power is also made plain by section 5857, which directs that the surplus, if any, at the sale shall be paid to the mortgagor, his representatives or assigns, which plainly contemplates a sale after the death of the mortgagor. These several sections are identical in language with sections 2813, 2829, 4007, 4354, 5411, 5424 of the Complied Laws, which were construed by the supreme court of South Dakota in a learned and exhaustive opinion written by Kellan, J., in Reilly v. Phillips, 4 S. Dak. 604, 57 N. W. 780, which was a case involving the precise questions under consideration and upon facts almost identical. In that case the widow and heirs of a deceased mortgagor made the same claim that is set up by these defendants. That court, after a careful investigation, reached the conclusion that "both under our statute or without it the power of sale is one so coupled with an interest that it survives the death of the grantor." We fully agree with this conclusion, and approve the following language as directly applicable and controlling in this case: "She [the deceased mortgagor] could leave no more to her heirs than she herself had at the time of her death. Their rights must be measured by hers. [229] They took her place, and might only do with respect to the property what she might do. The rights of the heirs having accrued subsequent to the mortgage, they are subordinate to it, not only to the lien of the mortgage, but to the power of sale which it conveyed as a part of the security. By the statute of our state no notice of sale is required to be served upon anybody. General notice to all

interested is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgage, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service, if made, would be entirely voluntary on the part of the mortgagee, and could add nothing to the legal effect of the sale. This court cannot add to the statute another provision requiring that express notice shall be given to minor heirs or their guardian in order to make the foreclosure sale effective against them. If, as the law stands, a foreclosure would be good with such actual notice, it is good without it."

It follows from what we have already said that the foreclosure in question was regular and valid, and that the defendants, having failed to redeem within the time allowed by law, have no right, title, or interest in said premises, and that the plaintiff is entitled to judgment confirming his title to said real estate, and enjoining said defendants from asserting any claim or demand thereto, and giving possession thereof to the plaintiff. The district court is accordingly directed to enter an order vacating its judgment heretofore entered, and to direct the entry of a judgment in plaintiff's favor for the relief to which he is entitled, as above stated.

Counsel for respondents in his oral argument, and also in his brief filed in this court, requested that, in the event of an adverse decision, the case be sent back to the district court for a new trial. Section 5630 of the Revised Codes, under which this case was tried and the appeal taken, among other things provides that this court may, "if it deem such a course necessary to the accomplishment of justice, order a new trial of the action." Just how broad a discretion is intended to be given by the language quoted is a matter of much doubt. But it is clear that the power so conferred should not be exercised arbitrarily or capriciously, but only upon substantial grounds. Such grounds do not exist in this case. It is true the respondents did not introduce any evidence in the district court, for the reason, as appears, that the court held with the views of respondents' counsel, which were presented at the close of plaintiff's case—namely, that the notice of sale was insufficient, and the foreclosure proceedings void. The opportunity existed, however, for presenting testimony, if respondents so desired. There is not in this case

even the suggestion of a possibility of establishing facts which would alter the conclusions we have already announced. Under such circumstances, [230] it certainly would not be in furtherance of justice to grant the request, and the same is denied. Judgment is reversed, and the district court will enter judgment as heretofore directed.

All concur.

A Power of Sale in a Mortgage is a power coupled with an interest: Barrick v. Horner, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111; Mutual Loan etc. Co. v. Haas, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980. Compare Johnson v. Johnson, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606. It does not cease on the death of the mortgagor, and the land may be sold thereunder without notice to the heirs: Carter v. Slocomb, 122 N. C. 475, 65 Am. St. Rep. 714, 29 S. E. 720.

The Certificate of a Notary of another state is prima facie evidence of the facts therein set forth: Fletcher v. Arkansas Nat. Bank, 62 Ark. 265, 54 Am. St. Rep. 294, 35 S. W. 228.

Notice of Foreclosure Sales by advertisement, when required by statute to be given for a certain number of weeks successively, are considered in Finlayson v. Peterson, 5 N. Dak. 587, 57 Am. St. Rep. 584, 67 N. W. 953; Washington v. Bassett, 15 R. I. 563, 2 Am. St. Rep. 929, 10 Atl. 625; monographic note to Hoffman v. Anthony, 75 Am. Dec. 708, 709.

POWER v. KITCHING.

[10 N. Dak. 254, 86 N. W. 737.]

THE STATUTE OF LIMITATIONS MAY BE CHANGED, provided a reasonable time is allowed within which actions may be brought. (p. 693.)

TITLE OF STATUTES.—THE CONSTITUTIONAL RESTRICTIONS respecting the title of statutes are construed liberally. (pp. 693, 694.)

TITLE OF STATUTES, WHEN SUFFICIENT.—Under the title of "An act relating to the title to real property," a statute may be enacted specifying the time within which suits must be brought to determine conflicting claims to the title to real property. (p. 694.)

TITLE BY ADVERSE POSSESSION MAY BE ACQUIRED, in North Dakota, by actual, open, adverse, and undisputed possession for ten years, with payment of taxes and assessments. (p. 696.)

ADVERSE POSSESSION.—A CLAIM OF TITLE MAY REST upon a writing, or a decree of court, or in parol. (p. 696.)

ADVERSE POSSESSION.—THE PAYMENT OF TAXES is not, independently of statute, essential to acquiring title by adverse possession. (p. 696.)

COLOR OF TITLE.—A TAX DEED VOID on its face may constitute color of title on which to found a title by adverse possession. (p. 697.)

ADVERSE POSSESSION.—COLOR OF TITLE is that which in appearance is title, but which in reality is no title. (p. 698.)

STATUTE.—THE PRESUMPTION IS THAT A PUBLISHED STATUTE is a true copy of the bill in the office of the Secretary of State. (p. 699.)

STATUTE—EVIDENCE OF ENACTMENT.—An enrolled bill properly authenticated and on file with the Secretary of State must prevail as against conflicting entries in the journals of the house and Senate. (pp. 698, 699.)

J. E. Robinson, for the appellant.

Cole & Martinson and Benjamin Tufte, for the respondent.

[267] WALLIN, C. J. The plaintiff in this action sues to recover the possession and the value of the use of a quarter section of land situated in the county of Griggs. It is conceded that plaintiff is the fee simple owner of the land, unless the defendant has acquired title thereto by virtue of his claim of title pleaded in the answer to the complaint. The defendant alleges, in effect, that he is the owner and holder of a tax deed which describes the land, a copy of which is annexed to and made a part of the answer. Said deed is dated on November 2, 1889, and the same was recorded on said date. The deed named the defendant as grantee therein, and embraces a description of the land in question. It purports to have been issued pursuant to a tax sale made in Griggs county on November 1, 1887, for the taxes charged against the land in 1886. The deed is in the form prescribed by section 1639 of the Compiled Laws, and recites on its face that it is made "between the territory of Dakota, by Knud Thompson, the treasurer of said county, of the first part, and the said John Kitching, of the second part." Defendant alleges title and ownership under said deed, and that he has been in the quiet possession of said land under said deed ever since the second day of November, 1889, and that the said possession of the land by the defendant has been continuous from said date, and the same has been open, notorious, and peaceable. The answer further states that the defendant has regularly and fully paid all taxes assessed against said lands since said tax deed was issued to him. Plaintiff served a reply denying the allegations of the answer, and alleging that said tax deed is void on its face, and void because the land was not described in the assessment-roll or tax list of 1886, and that no assessor's oath was annexed to the roll in said year. The defendant concedes that the assessment of 1886 is void, and the trial court so found. Upon these issues the case was tried to the court, and judgment was entered quieting the title in the defendant. Plaintiff appeals from the judgment, and demands a trial anew in this court. The evidence

offered below is in the record, and we find no conflict in the same upon any point which we deem material to a proper decision of the case.

The tax deed was issued and recorded, as already stated, and the evidence shows conclusively that the defendant claimed title and ownership of the land under the deed. Defendant fenced a part of the land, and farmed another portion. He also placed buildings upon the land, and at the time of the trial resided upon the land. His occupation for farming purposes is shown to have been continuous for a period of over ten years after he received the deed, [258] and the evidence is undisputed that the plaintiff never attempted to interfere with the defendant's possession, and that plaintiff never claimed the title of the land, to defendant's knowledge, until this action was commenced on August 13, 1900. Defendant claims title under said deed, and by virtue of his continuous adverse possession of the land for a period of over ten years, together with payment of all taxes charged against the land during said period, and bases his claim of title upon chapter 158 of the Laws of 1899: See Rev. Codes 1899, sec. 3491a. This statute was approved March 8, 1899, and took effect July 1, 1899. Under the terms of said statute, the defendant's title to the land did not mature or become perfect until November 2, 1899. There was therefore a period of over seven months after the approval of the law by the governor, and a period of over four months after the law took effect, within which an action might have been brought against the defendant to determine his adverse claim of title. Said chapter, therefore, when applied to conditions established in this case, did not operate to unreasonably abridge the period within which an action might be brought to determine defendant's claim of title. A purchaser at a tax sale has no vested right in the statute of limitation in force at the date of sale. The statute may be changed and shortened by subsequent legislation, provided, always, that a reasonable time is allowed within which actions may be brought: See a full discussion of this point in Osborne v. Lindstrom, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72; Keith v. Keith, 26 Kan. 26.

But appellant's counsel claims that the statute embraced in chapter 158 of the Laws of 1899 is unconstitutional, and hence void under section 61 of the state constitution, which is as follows: "No bill shall embrace more than one subject, which shall be expressed in its title," etc. In support of this point, counsel cites a number of cases decided by this court in which this sec-

tion has been construed. We think none of the cases are in point, because in all of them the facts are wholly unlike those in the case under consideration. For the purposes of a decision, each case must stand upon the language employed by the legislature, and must be governed by its own peculiar facts and conditions. But the authorities are uniform to the point that similar constitutional restrictions upon legislative action should have a liberal construction in the courts. A narrow interpretation of the language would require the title of all bills to embrace a statement of the details and particular features to be found in the body of the act. Any such rigid rule would, in our opinion, lead to abuses more intolerable than those which were sought to be corrected by the constitution. The object was to correct a certain abuse. In earlier times legislatures had not infrequently enacted laws under false and misleading titles, and thereby concealed from the people, as well as from members of the legislative body, the true character of laws so enacted. To prevent such an abuse, the constitution declares, in effect: 1. No law shall embrace more than one subject; 2. [259] Such subject must be expressed in the title of the bill. Tested by this language, we are convinced that the statute in question is not obnoxious to the constitution. The title is certainly not a model. It is extremely general in its reference to the subject of the law, as the same is set forth in the body of the enactment. Nevertheless the title does refer to the subject of the enactment, and refers to nothing else and nothing different. The law itself deals with the matter of acquiring title to real estate in a particular manner, which is detailed in the body of the law. The title declares that the bill which embraces the law is "an act relating to title to real property." We think the subject of the law is "expressed in the title." True, it does not indicate the particular features of the law, but it certainly points out the subject of the law, and does so with accuracy. Hence this point will be ruled against the appellant.

Turning, now, to the statute under which defendant claims title, we discover from its language that the legislative purpose in its enactment was to validate or make perfect defective titles to land. It declares: "All titles to real property vested in any person or persons shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." This validation of title, however, can be accomplished only by fully meeting the requirements laid down in the statute. The

benefits of the statute can be realized by only those "who have been or hereafter may be in the actual, open, adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon." As has been seen, the defendant in the case at bar has shown by undisputed testimony that he has fully complied with the requirements of this statute with reference to the duration and character of his adverse possession of the land, and also with respect to the payment of the taxes assessed thereon.

There remains, therefore, for consideration, only one further question, viz., whether the tax deed under which the defendant claims that title has vested in him is a sufficient title to sustain the defendant's contention. This question, under the authorities, is one of no little difficulty. Judicial opinion upon it is abundant, but there is much conflict in the decisions of the courts, and no little confusion has resulted therefrom. In this court the questions for determination are entirely new, and we are therefore neither governed nor hampered by precedents of our own making. We remark, first, that the defendant, to sustain his tax deed, neither relied upon nor pleaded in bar of the action the special statute of limitations which was in force when the land was sold for taxes, and is found in section 1640 of the Compiled Laws. Such a defense, had it been pleaded, would have been unavailing under the facts in this record. It is conceded that the pretended tax for which the land was sold was never assessed. This defect in the tax proceedings is, under the repeated decisions of this court, one which goes to the groundwork of the tax, [260] and operates to defeat the jurisdiction of the taxing officers. A tax deed based on a sale for such pretended taxes, though regular on its face, would be voidable, and would be vacated in any action brought to avoid the same; nor would such a deed be protected by the statute of limitations: See Roberts v. First Nat. Bank, 8 N. Dak. 504, 79 N. W. 1049; Sweigle v. Gates, 9 N. Dak. 538, 84 N. W. 481. It would follow necessarily from these precedents that, if the defendant's claim of title rested entirely upon the validity of the tax deed set out in his answer, his claim would be worthless and held for naught. But defendant does not rest his claim of title solely upon the validity of his tax deed. His title depends upon a special statute which forms no part of the revenue laws of the state, and which nowhere refers in terms either to taxes or tax titles. The benefits of the statutes are intended for all who are vested with

imperfect titles to real estate, and are not limited to persons holding tax titles. The statute (Laws 1899, c. 158) establishes a mode and manner of acquiring title to land which is new to this state. Under this statute, title is not acquired until each of three prescribed conditions are fully met: 1. The claimant must be vested with some sort of title; 2. He must occupy the land, under claim of title thereto, openly, adversely, and exclusively, for a period of ten years; finally, the claimant must pay all taxes assessed against the land for such period. The only difficulty presented in this case is to determine whether the defendant is vested with a sufficient title or color of title to the land to come within the benefits of the statute. At common law, as well as under the code of this state, a valid title to land is created by twenty years of adverse occupancy under claim of title. The claim of title, to be effectual, may rest upon a writing or upon a decree of a court, or may rest in parol, merely, and not upon any writing: See Rev. Codes 1899, secs. 3491, 5191-5195, inclusive. But the payment of taxes is not essential in acquiring title at common law, or under the general statutes governing the matter of twenty years' adverse possession. But the legislature in the act of 1899 has seen proper, on the one hand, to shorten the period of adverse occupancy to ten years, and, on the other, to add a new condition, viz., that of the payment of all taxes. The act of 1899 does not attempt to define the nature of the title upon which the claimant under the statute may rest as a basis upon which to build up a title by adverse possession and the payment of taxes. It becomes necessary, therefore, to have recourse to general principles of law in solving this question. In this respect we have derived no aid from the brief of counsel for the appellant. Counsel has relied upon the claim that the act of 1899 is unconstitutional on the ground above indicated, and upon the further ground that the tax deed annexed to the answer is wholly void, and this for reasons dehors the deed, as well as upon the ground that the instrument, as counsel claims, is void upon its face. The tax deed was signed with the name of the county treasurer, but to this was not appended his official designation. The [261] deed was not under seal, except as follows: "(Seal.)" There were defects, also, appearing on the face of the deed to which counsel calls attention, and which he claims operate to make the deed void on its face. Without deciding the question, we shall assume, for the purposes of this case, that the deed is void on its face. Conceding this fact, it is nevertheless true that

the instrument is in the form of a deed of conveyance prescribed by the statute, and was made and delivered by an officer having general authority to sell land for delinquent taxes, and to execute and deliver tax deeds describing the land so sold. Such a deed was delivered to the defendant. It described the land, and purported in terms to convey a title in fee simple to the defendant. It is under such a deed that the defendant, a layman, claims title, and there is no suggestion in the record that the defendant has not at all times in good faith relied upon this deed as the basis of his claim of ownership. Is this deed sufficient to sustain the defendant's claim of title? Standing alone, the deed is worthless. But we are of the opinion, and shall so rule, that it is a sufficient color of title to serve as a basis upon which defendant, under the statute, can predicate a good title to the land. There are decisions, and those made by courts of high rank, holding that deeds of conveyance void on their face do not constitute color of title, and this is the holding in a number of states: See 25 Am. & Eng. Ency. of Law, 1st ed., 704. But upon this point there is great conflict in the cases. We cite below some of the many cases which hold that instruments which describe the land and purport to convey the same will give a color of title upon which a claim of title by adverse possession may rest, even when for other reasons the instruments may be void. There seems to be great unanimity in the holdings that a tax deed regular on its face, even when voidable on account of fundamental defects in the antecedent tax proceedings, will constitute color of title, within the meaning of the law governing the acquisition of title by adverse possession: See 25 Am. & Eng. Ency. of Law, 1st ed., 704, and authorities in note 2. But the cases are numerous which hold that an instrument void on its face for certain reasons may nevertheless be good as color of title on which to found a claim of title by adverse possession: See Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. Rep. 539; Gatling v. Lane, 17 Neb. 77, 80, 22 N. W. 227; Hamilton v. Boggess, 63 Mo. 233; Wilson v. Atkinson, 77 Cal. 485, 11 Am. St. Rep. 299, 20 Pac. 66; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473, citing Wright v. Mattison, 18 How. 50; Smith v. Shattuck, 12 Or. 362, 7 Pac. 335; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Chicago etc. Ry. Co. v. Allfree, 64 Iowa, 500, 20 N. W. 779; Stevens v. Johnson, 55 N. H. 405. As to defective and void titles, see Sedgwick and Waite's Trial of Title to Land, sec. 780, and authorities cited in note 7; Lantry v. Parker,

37 Neb. 353, 55 N. W. 962; Sater v. Meadows, 68 Iowa, 507, 27 N. W. 481; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 221; Hardin v. Crate, 60 Ill. 215; Piatt Co. v. Goodell, 97 Ill. 88; Harrison v. Spencer, 90 Mich. 586, 51 N. W. 642; Pillow v. [262] Roberts, 13 How. 472; Brooks v. Bruyn, 35 Ill. 392; Black on Tax Titles, sec. 502. In the section last cited the author defines color of title as follows: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described." The supreme court of the United States (Wright v. Mattison, 18 How. 56) adds the following: "The courts have concurred, it is believed, without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title." Many additional authorities might be cited, but, as already stated, there is a wide divergence of judicial opinion, and much conflict in the cases, upon the question of what constitutes color of title, and particularly whether a deed so irregular as to be void on its face will constitute color of title for the purpose of proving title by adverse possession. The deed in suit is one made prima facie evidence of title by statute. It has a grantor and a grantee. It contains a description of the land, and apt words showing an intent to convey. It came from an officer clothed with authority to sell land for taxes, and to give deeds therefor. We therefore hold, under what we deem to be the better authority, that the deed in question is a sufficient color of title upon which defendant can build a claim of ownership by adverse possession.

The judgment of the trial court will be affirmed.

All the judges concurring.

ON PETITION FOR REHEARING.

The defendant asks for a rehearing in this court upon several grounds relating to points discussed in the original opinion in this case. As to such points, it is enough to say that the views of the court have undergone no change since the decision was handed down, and that the same, therefore, will be adhered to, without further attempts at elucidation. But the petition embraces one point not referred to in any way upon the argument in this court. The fact that the point is first mentioned in a petition for a rehearing would alone justify a denial of the petition: See Sweigle v. Gates, 9 N. Dak. 538, 84 N. W. 481. But

in this case a denial of the petition may safely rest upon the merits. The petitioner claims that the statute referred to in the original opinion, and relied upon by the defendant (Laws 1899, c. 158) was never enacted or passed by both branches of the legislative assembly. It is conceded that a bill (No. 121) embracing the statute originated in the Senate, and, after passing that body, that it was regularly transmitted to the House of Representatives; and it is further conceded that the House journal shows that the bill was amended in the House, and after being amended was regularly passed by the House, and that upon the day of its passage in the House it was certified or messaged to the Senate by the chief clerk of the House, and that such certificate of the clerk stated in effect that the bill was returned to the Senate "unchanged," thereby declaring that the bill had not been amended in [263] the House of Representatives. It is further conceded that, after the measure was returned to the Senate, it was regularly signed there, but the journal of the Senate is silent as to any passage of the measure by the Senate after its return from the House. It is noticeable that the petition nowhere states that said chapter 158, as published in the Session Laws of 1899, is not a copy of an enrolled Senate bill which is on file in the office of the Secretary of State. The existence of an enrolled bill on file with the proper state official seems to be studiously ignored by the petitioner. Until the contrary is made to appear, courts are bound to presume that the published statute is in fact a true copy of the bill in the office of the Secretary of State. In this case, however, the writer has been at pains to verify this legal presumption, and by a search has ascertained the fact that the published statute is a verbatim copy of the law on file, and that the original enactment is not only signed by the governor, but is further authenticated by the president and secretary of the Senate, and by the speaker and chief clerk of the House of Representatives. The petitioner reminds the court that the court is in duty bound to judicially notice the journals of both branches of the legislature; but the petition does not advise the court respecting any rule of law which is to govern courts in a case such as this, where the legislative journals are at loggerheads with each other, and where it will become necessary in deciding a question of fact, to accept one part of the record evidence, and disregard another. That such a conflict of evidence exists in this case is manifest. The House journal shows affirmatively that the bill was amended in that body, and that it passed after such amendment. But the

Senate journal shows affirmatively that a sworn officer of the House—its chief clerk—certified that the bill was returned to the Senate "unchanged," which means and must mean that the measure was not amended in the House. There is also strong negative evidence that the bill was not amended in the House. Had it been so amended, it would have been necessary to again pass it in the Senate before it could take effect as a law, or be officially signed and sent to the governor for approval. But the Senate journal is silent as to any such action after the bill was returned to the Senate. The Senate journal only shows that the bill was signed officially in the Senate after being transmitted from the house. This silence of the Senate journal, while negative in character, is nevertheless strong evidence that the bill never was amended in the House. We refer to these conflicts in the evidence, however, only to show that there is evidence to be found in the journals of the two Houses bearing upon both sides of the question of fact to be determined, viz., whether the published law was in fact ever enacted by both branches of the legislature. The evidence of the journals being conflicting, it will be necessary to consider the evidential effect of the enrolled bill properly authenticated and on file with the Secretary of State. Which shall prevail? Which possesses the greater probative force—the conflicting evidence of the journals, [264] upon one side, or, on the other side, the positive evidence, consisting of the authenticated bill found in the hands of the official custodian of the laws? Many courts have attempted to answer this question, and judicial tribunals of the highest respectability have widely differed in their answers. But we are inclined to the opinion that the better reason, as well as the greater weight of authority, will be found to preponderate in favor of the evidence to be found in the bill itself, when properly authenticated. The supreme court of South Dakota, in a very recent case, has reached this conclusion; and in its opinion the court has exhaustively considered and very ably discussed the leading cases bearing upon the question: See Narregang v. Brown Co., 14 S. Dak. 357, 85 N. W. 602, 605. We are satisfied with the reasoning contained in the opinion in the case cited, and we shall therefore content ourselves with a citation of that case and the authorities found in it.

The petition is denied.

All the judges concurring.

WHAT CONSTITUTES COLOR OF TITLE WITHIN THE MEANING OF THE LAW OF ADVERSE POSSESSION.*

I. General Principles.
 a. Color of Title Defined.
 b. Color and Claim of Title Distinguished.
 c. Necessity of Color of Title.
 d. Purpose and Effect of Color.

II. Requisites of Color of Title.
 a. Necessity of Valid Instrument.
 1. Valid Instrument not Required.
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 3. Materiality of Validity.
 b. Of Chain of Title.
 c. Necessity of Writing.
 1. Decisions Denying the Necessity.
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 1. General Rules.
 2. Extrinsic Evidence to Aid Description.
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 f. Necessity of Seal.
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 h. Of Recording and Registration.
 i. Of Good Faith.
 1. Decisions Considering Good Faith Essential.
 2. Modification of this Doctrine.
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 5. Conclusion.

III. Persons Executing Instruments.
 a. Grantor without Title.
 b. Agents.
 c. Cotenants.
 d. Married Women.
 e. Married Men.
 f. Lunatics.
 g. Indians.

*REFERENCES TO MONOGRAPHIC NOTES.

What is color of title: 14 Am. Dec. 580-584.
Color of title to public lands: 76 Am. St. Rep. 483, 490.
Elements of adverse possession: 48 Am. St. Rep. 158-162.
Adverse possession to public and quasi-public property: 14 Am. St. Rep. 278-282; 76 Am. St. Rep. 479-493; 87 Am. St. Rep. 775-782.
Adverse possession as between husband and wife: 18 Am. St. Rep. 113-115.
Adverse possession of part as possession of the whole: 12 Am. Dec. 357-359.
Mistake and ignorance as to boundaries as affecting adverse possession: 24 Am. St. Rep. 388-390.
Remedies for injuries to real estate held adversely: 85 Am. Dec. 321-327.
Entry by owner terminating adverse possession: 83 Am. Dec. 497-500.

IV. Instruments Executed and Properties Transferred.
a. Contract to Convey.
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2. In Parol.
b. Quitclaim Deed.
c. Mortgage and Deed of Mortgaged Property.
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I. General Principles.

a. Color of Title Defined.—Color of title is "that which in appearance is title, but which in reality is no title"; that which seems and professes to convey the property described, but for some reason does not do so. It is a sign, semblance, or appearance of title, distinguishing the occupant thereunder from a naked trespasser or intruder: Saltmarsh v. Crommelin, 24 Ala. 347; Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351; Veal v. Robinson, 70 Ga. 809; Baker v. Swan, 82 Md. 358; Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; St. Louis v. Gorman, 29 Mo. 593, 77 Am. Dec. 586; Tate v. Southard, 3 Hawks, 119, 14 Am. Dec. 578; Power v. Kitching, 10 N. Dak. 254, ante, p. 691, 86 N. W. 737; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232; Wright v. Mattison, 18 How. 50; Latta v. Clifford.

47 Fed. 614; Cameron v. United States, 148 U. S. 301, 13 Sup. Ct. Rep. 595.

b. **Color and Claim of Title Distinguished.**—The terms "claim of title" and "color of title" are sometimes so employed by courts as to afford grounds for the possible inference that they are synonymous. But they are entirely different things: Hamilton v. Wright, 30 Iowa, 480, 486; Allen v. Mansfield, 108 Mo. 343, 348, 18 S. W. 901. Claim of title exists when one enters on and occupies property with the intent to hold it as his own as against the whole world, irrespective of any semblance or shadow of right or title as a foundation therefor. Color of title is at least a semblance or appearance of title. While the two are distinct from, they are supplementary to, each other. A claimant may have either or both, and in each case the measure of his rights will be different. Color of title alone, without claim of title, amounts practically to nothing. Claim of title, without color of title, will ripen into title to only so much property as actually is occupied; color of title, accompanied by claim of title, will draw to the part actually occupied the constructive possession of the remainder of the track to which it purports to be title: See the authorities cited under "Color of Title Defined," "Necessity of Color of Title," and "Purpose and Effect of Color."

c. **Necessity of Color of Title.**—Unless expressly required by the statute, color of title is not necessary to the acquisition of title by adverse possession. All that is necessary to render possession of lands adverse and set the statute of limitations in operation, is that the claimant enter and take possession with the intention to hold the lands as his, to the exclusion of all others. But a title depending solely upon acts of adverse possession, and deriving no color from any source, does not extend beyond the land actually occupied. The right is commensurate with the use; the enjoyment is limited to that which has been actually enjoyed: Smith v. Roberts, 62 Ala. 83; Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Moore v. Hinkle, 151 Ind. 343, 50 N. E. 822; Anderson v. Burnham, 52 Kan. 454, 34 Pac. 1056; Ward v. Nestell, 113 Mich. 185, 71 N. W. 593; Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424; Mather v. Walsh, 107 Mo. 121, 17 S. W. 755; Omaha etc. Trust Co. v. Barrett, 31 Neb. 803, 48 N. W. 967; Pennsylvania R. R. Co. v. Breckenridge, 60 N. J. L. 583, 38 Atl. 740; Humphries v. Huffman, 33 Ohio St. 395; Watson v. Gregg, 10 Watts, 289, 36 Am. Dec. 176; Jakeway v. Barrett, 38 Vt. 316; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199.

d. **Purpose and Effect of Color.**—The virtue ascribed to color of title is simply that it affords evidence of the nature of the entry and of the extent of an exclusive and adverse claim, and draws to the actual possession of a part the constructive possession of the entire tract which it describes and professes to convey. If a claimant acquires possession by a trespass his possession necessarily is confined to his possessio pedis, since there is no means afforded by which his intention can be ascertained as to the extent in area

of his claim, except the land actually occupied. But, if his entry is under color of title defining the boundaries, his possession extends to the boundaries as therein fixed, since the color of title furnishes the presumption and evidence of the intention to claim to this extent: Hooper v. Clayton, 81 Ala. 391, 2 South. 24; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454; Tennessee Coal etc. Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108, 26 South. 245; Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 South. 596; Sholl v. German Coal Co., 139 Ill. 21, 28 N. E. 748; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632; Barber v. Robinson, 82 Minn. 112, 84 N. W. 732; Humphries v. Huffman, 33 Ohio St. 395; Smith v. Steele, 17 Pa. St. 30; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Stull v. Rich Patch Iron Co., 92 Va. 258, 23 S. E. 293; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423.

But, while color of title draws the constructive possession of the whole premises to the actual possession of a part only, and is evidence of the nature of the entry and of the extent and boundaries of the possession claimed, it is not, of itself, evidence of adverse possession, nor does it necessarily follow that adverse possession can be proved by less evidence when the entry is under color of title than when it is not: Childress v. Calloway, 76 Ala. 128, 133; Christy v. Spring Valley Water Works, 97 Cal. 21, 26, 31 Pac. 1110; Mervin v. Morris, 71 Conn. 555, 42 Atl. 855. Moreover, color of title, without adverse possession thereunder, does not operate to give constructive possession. It amounts to nothing, unless connected with adverse possession: Black v. Tennessee Coal etc. Co., 93 Ala. 109, 9 South. 537; National Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 South. 47; Foulke v. Bond, 41 N. J. L. 527, 547; Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79.

II. Requisites of Color of Title.

a. Necessity of Valid Instrument.

1. **Valid Instrument not Required.**—Manifestly, an instrument, in order to constitute color of title, need not be valid as a muniment of title. One with a good title stands in no need of the protection of the statute of limitations, and the defense of the statute excludes the idea of a valid title. The term "color of title" itself implies that the title thus described is not valid. Defects and imperfections in an instrument do not preclude its being available as color of title. Generally speaking, any instrument, however defective or imperfect, and no matter from what cause invalid, purporting to convey the land, and showing the extent of the tenant's claim, may be color of title; and a claim to the land thereunder will draw to the claimant the protection of the statute of limitations, the other requisites of adverse possession being complied with: Abercrombie v. Baldwin, 15 Ala. 363; Cofer v. Brooks, 20 Ark. 542; Mulford v.

Le France, 26 Cal. 88; Taylor v. Dansbury Public Hall, 35 Conn. 430; Home v. Carter, 20 Fla. 45; Williamson v. Tison, 99 Ga. 791, 26 S. E. 766; McCagg v. Heacock, 34 Ill. 476, 85 Am. Dec. 327; Brooks v. Bruyn, 35 Ill. 392; Doe v. Hearick, 14 Ind. 242; Chicago etc. Ry. Co. v. Allfree, 64 Iowa, 500, 20 N. E. 779; Sater v. Meadows, 68 Iowa, 507, 27 N. W. 481; Logan v. Bull, 78 Ky. 607; Lurman v. Hubner, 75 Md. 268, 23 Atl. 646; Farrar v. Fessenden, 39 N. H. 268; Forest v. Jackson, 56 N. H. 357; La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463; Kent v. Harcourt, 33 Barb. 491; McNeill v. Fuller, 121 N. C. 209, 28 S. E. 299; Swift v. Mulkey, 17 Or. 532, 21 Pac. 871; Lyles v. Kirkpatrick, 9 S. C. 265; Hunton v. Nichols, 55 Tex. 217; Beach v. Sutton, 5 Vt. 209; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Mullan v. Carper, 37 W. Va. 215, 16 S. E. 527; Robinson v. Lowe, 50 W. Va. 75, 40 S. E. 454; Hacker v. Horlemus, 74 Wis. 25, 41 N. W. 965.

2. **Void Instruments.**—A void deed may be sufficient to give color of title. Though worthless as a conveyance and muniment of title, it may be admissible in evidence to show the extent and boundaries of the premises claimed: Torrey v. Forbes, 94 Ala. 135, 10 South. 320; Gump v. Sibley, 79 Md. 165, 28 Atl. 977; Trustees of Zion Church v. Hilkin, 84 Md. 170, 35 Atl. 9; Hanna v. Renfro, 32 Miss. 125; Nash v. Fletcher, 44 Miss. 609; Sutton v. Casseleggi, 77 Mo. 397; Ferguson v. Kennedy, Peck. (Tenn.) 321, 14 Am. Dec. 761; Charle v. Safford, 13 Tex. 94; Covey v. Porter, 22 W. Va. 120; Randolph v. Casey, 43 W. Va. 289, 27 S. E. 231; Bennett v. Pierce, 50 W. Va. 604, 40 S. E. 395; McIntyre v. Thompson, 10 Fed. 531. Some courts restrict this rule to deeds void by circumstances or evidence dehors the instrument: Eastman v. Beiller, 3 Rob. (La.) 220; Hall v. Mooring, 27 La. Ann. 596. In the majority of the states, however, a deed void on its face, if it possesses the general requisites of color of title, will furnish a basis for adverse possession: Bennett v. North Colorado etc. Imp. Co., 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812; Brinker v. Union Pac. etc. Ry. Co., 11 Colo. App. 166, 55 Pac. 207; Litchfield v. Sewell, 97 Iowa, 247, 66 N. W. 104; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; McMillan v. Wehle, 55 Wis. 685, 13 N. W. 694; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355; McCann v. Welch, 106 Wis. 142, 81 N. W. 996. For further authorities on this question, see "Tax Deeds," post.

3. **Materiality of Validity.**—The validity of an instrument relied upon as conferring color of title is not a material inquiry: Stovall v. Fowler, 72 Ala. 77. "Courts have concurred," said Justice Daniel, in Wright v. Mattison, 18 How. 50, "it is believed, without exception, in defining 'color of title' to be that which in appearance is title, but which, in reality, is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an ap-

parent or colorable title under which an entry or claim has been made in good faith": Kopp v. Herrman, 82 Md. 339, 33 Atl. 646; Erdman v. Corse, 87 Md. 506, 40 Atl. 107; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473; Bartlett v. Ambrose, 78 Fed. 843; Cameron v. United States, 148 U. S. 301, 13 Sup. Ct. Rep. 595; Schrimpscher v. Stockton, 183 U. S. 290, 22 Sup. Ct. Rep. 107.

b. Of Chain of Title.—It is not necessary that a title, in order to be colorable, should, when traced back to its source, prove to be an apparently legal and valid title; but the instrument under which the claimant holds and upon which he relies must profess to convey title to the grantee: Dawley v. Van Court, 21 Ill. 460; Rawson v. Fox, 65 Ill. 200; Nelson v. Davidson, 160 Ill. 254, 52 Am. St. Rep. 338, 43 N. E. 361. See, also, Hampton v. McGinnis, 1 Over. 286; Sawyer v. Shannon, 1 Over. 465, Fed. Cas. No. 12,405; Weatherhead v. Bledsoe, 2 Over. 352. But under the three years Texas statute of limitation, color of title is a consecutive chain of transfer from the sovereign power down to him in possession, without, however, being regular. There is no color if any link is so wanting that there is a hiatus in the chain; that is, when there is not merely a defect or flaw in some link which may make the chain weak at that point, but when there is no chain at all: Castro v. Wurzbach, 13 Tex. 128; Thompson v. Cragg, 24 Tex. 582; Brownson v. Scanlan, 59 Tex. 222; Brown v. O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267; League v. Atchison, 73 U. S. 112; Rice v. Willis, 87 Fed. 626.

c. Necessity of Writing.

1. Decisions Denying the Necessity.—There are many decided cases in which a writing or document of any sort is not considered essential to color of title: Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 Pac. 661; McClellan v. Kellogg, 17 Ill. 501; Teabout v. Daniels, 38 Iowa, 158; Vancleave v. Milliken, 13 Ind. 105; Sumner v. Stevens, 6 Met. 337; Rannels v. Rannels, 52 Mo. 108; Cooper v. Ord, 60 Mo. 420; McCall v. Neely, 3 Watts, 69; Green v. Kellum, 23 Pa. St. 254, 62 Am. Dec. 332; Baker v. Hale, 6 Baxt. 46. In Bell v. Longworth, 6 Ind. 273, Perkins, J, after stating the rule that one without color of title cannot acquire title beyond the land actually occupied, says: "But, where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title does more; for such title alone does not give right; and possession under such facts as above indicated would be constructive notice, on general principles of law, to all the world, of the character of the claim title. Hence, it has been decided that possession, under a 'sale or gift of land by parol,' is under color of title: Sumner v. Stevens, 6 Met. 337." An heir continuing the possession of his ancestor is

considered to hold under color of title, yet there is an absence of any writing: See "Descent Cast," post.

2. Contrary Cases.—The trend of later decisions seems to be away from this doctrine. And in some states the statute expressly requires a writing: Knight v. Lawrence, 19 Colo. 425, 36 Pac. 242; Lower Latham Ditch Co. v. Louden etc. Co., 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629; Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516; Roe v. Kersey, 32 Ga. 152; Baird v. Evans, 58 Ga. 350; Hobby v. Alford, 73 Ga. 791; Converse v. Calumet River Ry. Co., 195 Ill. 204, 62 N. E. 887; Armijo v. Armijo, 4 N. Mex. 133, 13 Pac. 92; Williams v. Scott, 122 N. C. 545, 29 S. E. 877; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679. Thus, a parol gift of lands is held not color of title: Walsh v. McIntire, 68 Md. 402, 13 Atl. 348; Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901. So, in Tennessee Coal etc. Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108, 26 South. 245, a majority of the court are of the opinion that extending adverse possession under a verbal contract of sale to the boundary lines as fixed by the contract is limited in its application as between vendor and vendee, or, in case of an execution sale, to the defendant in execution and the purchaser thereat; and that, when no such relation exists between the parties litigant or their privies, the possession of the adverse holder is limited to his possessio pedis, unless he holds under written color of title. But Tyson, J., in delivering the opinion of the court, very aptly observes: "Just why a verbal contract fixing the boundaries of the purchaser's possession is not of equal dignity, and entitled to the same weight, when clearly proven, as a void, unknown, unrecorded writing, to serve as a guide in determining his entry and fix its character, I am unable to see. The position taken by my brothers seems to me to be flagrantly illogical, and certainly not conducive to justice and equity; for it may be, and doubtless is oftentimes, the case, that the adverse holder knows his deed is void, paying a consideration for the lands in proportion to his chances of success to remain in possession for ten years, and yet he is protected to the full extent of the boundaries described in his void deed, while the innocent purchaser, who may have paid full value, under a verbal contract, is restricted to his possessio pedis."

There is much sound logic in this language. Clearly, such a purchaser is not a trespasser. Moreover, his contract through performance on his part, is valid under the statute of frauds, and is a proper subject for specific performance: Pendergast v. Gullatt, 10 Ga. 218; Baker v. Hale, 6 Baxt. 46. See, also, Merrell v. Witherby, 120 Ala. 418, 74 Am. St. Rep. 39, 23 South. 994, 26 South. 974; Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960.

3. Actual Possession Dispenses with Necessity.—Actual possession of the entire tract under a parol gift or purchase will support the defense of the statute of limitations: Commonwealth v. Gibson, 85 Ky. 666, 4 S. W. 453; Lynn v. Cannada, 20 Ky. Law Rep. 1438,

49 S. W. 461; Creech v. Abner, 20 Ky. Law Rep. 1812, 50 S. W. 58; Gilbert v. Kelly, 22 Ky. Law Rep. 353, 57 S. W. 228; Pope v. Brassfield, 22 Ky. Law Rep. 1613, 61 S. W. 5; Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901. This follows from the general rule that a paper title is not necessary to the acquisition of title by adverse possession, if not expressly made so by the statute: English v. Register, 7 Ga. 387; Pendergast v. Gullatt, 10 Ga. 218; Campau v. Lafferty, 50 Mich. 114, 15 N. W. 40; Vier v. Detroit, 111 Mich. 646, 70 N. W. 139; National Min. Co. v. Powers, 3 Mont. 344; Minnesota etc. Imp. Co. v. Brasier, 18 Mont. 444, 45 Pac. 632. The question of color of title, however, is not involved in these cases, for there is no attempt to assert constructive possession: See, in this connection, "Necessity of Color of Title," and "Purpose and Effect of Color," ante.

d. **Of Words Purporting to Convey.**—Whenever an instrument by apt words of conveyance from grantor to grantee in form transfers what purports to be the title, it gives color of title. Color of title may be shown by any paper purporting to convey the land or the right to possession into the party asserting adverse possession, however and for whatever reasons it may be lacking in the essentials of a muniment of title. But the instrument must profess to pass title. It must purport on its face to convey the title to the grantee, and apparently do so: Goodson v. Brothers, 111 Ala. 589, 20 South. 443; Cook v. Norton, 43 Ill. 391; Rigor v. Frye, 62 Ill. 507; Coleman v. Billings, 89 Ill. 183; Bolden v. Sherman, 110 Ill. 418; Nelson v. Davidson, 160 Ill. 254, 52 Am. St. Rep. 338, 43 N. E. 361; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; Converse v. Calumet River Ry. Co., 195 Ill. 204, 62 N. E. 887; McClanahan v. Barron, 27 Miss. 664; Avent v. Arrington, 105 N. C. 377, 10 S. E. 991; Wood v. Conrad, 2 S. Dak. 334, 50 N. W. 95; Field v. Columbet, 4 Saw. 523, Fed. Cas. No. 4764; Westenfelder v. Green, 76 Fed. 925; Osterman v. Baldwin, 73 U. S. 116; Hall v. Law, 102 U. S. 461.

e. Of Certainty of Description.

1. **General Rules.**—The chief purpose of color of title is constructively to extend the possession of an occupant to the confines of the entire tract, in case he is in actual possession of a part only. Moreover, a deed, in order to constitute a semblance of title, requires a thing granted. It is obvious, therefore, that a proper description of the premises in the instrument relied upon as color of title is of vital importance. If the description does not identify the land with the degree of certainty essential to ascertain the boundaries and identity thereof, the deed or other instrument lacks one of the first essentials of color of title. The general statement is often made that a deed, void for indefiniteness or uncertainty of description of the land it purports to convey, is not color of title, and the possession under it is limited to part of the land actually occupied: Black v. Tennessee Coal etc. Co., 93 Ala. 109, 9 South.

537; Reddick v. Long, 124 Ala. 260, 27 South. 402; Breckeridge v. Crocker (Ariz.), 21 Pac. 179; Dubuque v. Cowan, 64 Conn. 475, 30 Atl. 777; Etowah etc. Min. Co. v. Parker, 73 Ga. 51; Shackleford v. Bailey, 35 Ill. 387; Weaver v. Wilson, 48 Ill. 125; Wray v. Chicago etc. R. R. Co., 86 Ill. 424; Bolden v. Sherman, 101 Ill. 483; Zilch v. Young, 184 Ill. 333, 56 N. E. 318; Hanna v. Palmer, 194 Ill. 41, 61 N. E. 1051; Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Woods v. Banks, 14 N. H. 101; Laverty v. Moore, 33 N. Y. 658; Wheeler v. Spinola, 54 N. Y. 377; Arents v. Long Island R. R. Co., 156 N. Y. 1, 50 N. E. 422; Price v. Jackson, 91 N. C. 11; Smith v. Fite, 92 N. C. 319; Baker v. Southern Ry. Co., 125 N. C. 596, 74 Am. St. Rep. 658, 34 S. E. 701; Davis v. Stroud, 104 N. C. 484, 10 S. E. 666; Humphries v. Huffman, 33 Ohio St. 395; Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Bassett v. Martin, 83 Tex. 339, 18 S. W. 587; Masterson v. Todd, 6 Tex. Civ. App. 131, 24 S. W. 682; Willis v. Burke, 7 Tex. Civ. App. 239, 27 S. W. 217; Crumbley v. Busse, 11 Tex. Civ. App. 319, 32 S. W. 438; Alexander v. Newton, 11 Tex. Civ. App. 618, 33 S. W. 305; Bowles v. Smith (Tex. Civ. App.), 34 S. W. 381; Williams v. Thomas, 18 Tex. Civ. App. 472, 44 S. W. 1073; Bruce v. Richardson (Tex. Civ. App.), 64 S. W. 785; Blakey v. Morris, 89 Va. 717, 17 S. E. 126.

It has been decided that a deed relied upon as color must describe the land with the same degree of certainty required of deeds relied upon as absolute conveyances: Allmendinger v. McHie, 189 Ill. 308, 59 N. E. 517; Hanna v. Palmer, 194 Ill. 41, 61 N. E. 1051. Without questioning the soundness of this rule, it is safe to say that a description is sufficient, if, unaided by extrinsic evidence, it satisfies the mind that the land occupied is embraced therein. Imperfection of description in a deed does necessarily render it inoperative as color of title: Black v. Tennessee Coal etc. Co., 93 Ala. 109, 9 South. 537; Tryon v. Huntoon, 67 Cal. 325, 7 Pac. 741; Childs v. Shower, 18 Iowa, 261; Smith v. Shattuck, 12 Or. 362, 7 Pac. 335; Hebard v. Scott, 95 Tenn. 467, 32 S. W. 390; McCurdy v. Locker, 2 Tex. Civ. App. 220, 20 S. W. 1109; Tarlton v. Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405; Day v. Needham, 2 Tex. Civ. App. 680, 22 S. W. 103; Hodge v. Ross, 6 Tex. Civ. App. 437, 25 S. W. 975; Hill v. Harris (Tex. Civ. App.), 64 S. W. 820; Flint v. Long, 12 Wash. 342, 41 Pac. 49; Heinselman v. Hunsicker, 103 Wis. 12, 79 N. W. 23.

A deed is color of title only to that which is shown to be within the description of the grant: Ohio etc. Ry. Co. v. Barker, 125 Ill. 303, 17 N. E. 797; Weinig v. Holcomb, 73 Iowa, 143, 34 N. W. 787. But while it is true that there are cases to the effect that color of title by deed cannot exist as to lands beyond what the deed purports to convey, still, "where the deed is fairly open to construction as to what it does purport to convey, and at the time it was executed the land was officially surveyed according to the

theory of the party claiming under such deed, it is manifest these authorities have no application. Color of title exists whenever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title": Cameron v. United States, 148 U. S. 301, 308, 13 Sup. Ct. Rep. 595.

2. **Extrinsic Evidence to Aid Description.**—An instrument of conveyance is color of title, notwithstanding it does not locate the land definitely and exactly, if the court can, with the aid of extrinsic evidence that does not add to, enlarge, or in any way change the description, fit the description to the property. And parol evidence is admissible in this connection: Tumlin v. Perry, 108 Ga. 520, 34 S. E. 171; McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Thornton v. Missouri Pac. Ry. Co., 40 Mo. App. 265; Cook v. Olive, 83 Tex. 559, 19 S. W. 161; Sharp v. Shenandoah Furnace Co. (Va.), 40 S. E. 103. The description, however, in order to warrant a resort to extrinsic evidence, must be such as is susceptible of being made definite by such evidence. And the testimony offered must not be such as will establish a description, where there practically is an absence of description in the instrument: Dickens v. Barnes, 79 N. C. 490; Simpson v. Johnson (Tex. Civ. App.), 44 S W. 1076; Sharp v. Shenandoah Furnace Co. (Va.), 40 S. E. 103. But if the description in a deed is too vague to be located by extrinsic evidence, it may, in fact, be located by the grantor himself; and he may be estopped from denying his acts, if at the time of the conveyance he has the land surveyed and places the grantee in actual possession, under designated lines and marked corners: Barker v. Southern Ry. Co., 125 N. C. 596, 74 Am. St. Rep. 658, 34 S. E. 701.

A deed of all the land owned by the grantor in a certain county has been held sufficient as color of title, when by reference to the records of such county it could be ascertained what lands were meant: Cantagrel v. Van Lupin, 58 Tex. 570; Alexander v. Newton, 11 Tex. Civ. App. 618, 33 S. W. 305. But a deed with no description, except by reference to an unrecorded sheriff's deed, is not color of title in Texas: McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490. And a deed, not sufficiently describing the land conveyed, is not aided by a reference to another deed for the correct description, if the latter deed is not produced: Allmendinger v. McHie, 189 Ill. 308, 59 N. E. 517.

3. **A Mistake in the Description in a deed,** whereby a portion of the premises intended to be conveyed is omitted, does not prevent the grantee from acquiring title by adverse possession to the land supposed to be conveyed: Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 525. However, the honest belief on the part of the

grantee that the grantor supposed the deed covered land which it does not is unavailing, if there is no contention that the descriptive words embraced in the deed are other than those intended to be used: Williamson v. Tison, 99 Ga. 791, 26 S. E. 766. A mistake in the description of some of the old deeds to land does not affect the title, where there has been possession for the statutory period under deeds the description of which corresponds with the lines of occupation: Bay v. Posner, 78 Md. 42, 26 Atl. 1084.

f. **Necessity of Seal.**—It is not necessary that a deed, to constitute color of title, should be under seal. This is true, though a seal is considered necessary to the validity of the instrument as a conveyance. If a deed is in other respects formal and purports to convey, it is good color of title without a seal: Watts v. Parker, 27 Ill. 224; Barger v. Hobbs, 67 Ill. 592. Thus, a sheriff's deed not under seal is color of title: Kruse v. Wilson, 79 Ill. 233. So is a master's deed. And when sealed subsequently to its delivery, the sealing relates to the original delivery: Davis v. Hall, 92 Ill. 85; Sanitary Dist. v. Allen, 178 Ill. 330, 53 N. E. 109.

g. **Of Acknowledgment.**—The valid acknowledgment of a deed is not a requisite of color of title. Though defectively acknowledged, or not acknowledged at all until years after its execution, a deed is admissible as color of title to define the extent of the possession thereunder and characterize the boundaries of the premises: McInerny v. Irvin, 90 Ala. 275, 7 South. 841; Reddick v. Long, 124 Ala. 260, 27 South. 402; Cramer v. Clow, 81 Iowa, 255, 47 N. W. 59; Dalton v. Bank of St. Louis, 54 Mo. 105; Campbell v. Laclede Gas Co., 84 Mo. 352. The instrument, in this last case, was an administrator's deed, not acknowledged in open court as required by statute.

h. **Of Recording and Registration.**—Color of title need not necessarily consist of recorded instruments. An unrecorded deed accompanied by possession of the premises (and without such possession color of title amounts to nothing in any case), is good color of title. The materiality of color of title is to show the nature and extent of the claim of the occupant. To subserve this purpose, it is not important whether the deed is recorded or not. The principal purpose for requiring the deed to be recorded probably would be to give the true owner notice of the adverse claim. But the actual occupation imparts such notice, even if notice be conceded necessary. Moreover, suppose the instrument is not executed in accordance with the statutory requisites to convey land. Then it is not entitled to registry, and its recording, consequently, is not constructive notice as to its contents: Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Ozark Land Co. v. Hays, 105 Mo. 143, 150, 16 S. W. 957; Plaster v. Grabeel, 160 Mo. 669, 61 S. W. 589; Minot v. Brooks, 16 N. H. 374; Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54; Bellows v. Jewell, 60 N. H. 420; Campbell v. McArthur, 2 Hawks, 33, 11 Am. Dec. 738; Hardin v. Barrett, 51 N. C. 159; Perry

v. Perry, 99 N. C. 270, 6 S. E. 86; Smith v. Allen, 112 N. C. 223, 16 S. E. 932; Utley v. Wilmington etc. R. R. Co., 119 N. C. 720, 25 S. E. 1021; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Lea v. Polk County Copper Co., 21 How. 493. See, also, in this connection: Hightower v. Williams, 88 Ga. 597; Jaques v. Lester, 118 Ill. 246, 8 N. E. 795; Poage v. Chinn, 34 Ky. (4 Dana) 50; Ring v. Gray, 45 Ky. (6 B. Mon.) 368; Winston v. Prevost, 6 La. Ann. 164; Bracy v. Buck, 11 La. Ann. 100; Gordon v. Parsons, 1 Bay, 87; Hornsby v. Davis (Tenn.), 36 S. W. 159.

It follows from the above doctrine that a deed improperly admitted to registry may constitute color of title: Brown v. Brown, 106 N. C. 451, 11 S. E. 647; and that a deed to land lying in two counties is color of title thereto when registered in only one: Lewis v. Roper, 109 N. C. 19, 13 S. E. 701. But see Prevost v. Ellis, 11 Rob. (La.) 56; Duplessis v. Boutte, 11 La. 344.

The statutes of limitation of a few states expressly require that an instrument, in order to be color of title, shall be registered or recorded: Snider v. Brown (Tenn.), 48 S. W. 377; Harvey v. Cummings, 68 Tex. 600, 5 S. W. 513; Sorley v. Matlock, 79 Tex. 304, 15 S. W. 261; Adkins v. Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; Davidson v. Wallingford (Tex. Civ. App.), 30 S. W. 286; Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; Hodges v. Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565; Allen v. Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200.

1. Of Good Faith.

1. **Decisions Considering Good Faith Essential.**—The decided cases abound with the assertion, expressed or implied, that good faith is an essential element either of adverse possession generally or of color of title: Saltmarsh v. Crommelin, 24 Ala. 347; Wilson v. Atkinson, 77 Cal. 485, 11 Am. St. Rep. 299, 20 Pac. 66; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 Pac. 661; McMullin v. Erwin, 58 Ga. 427; Lee v. Ogden, 83 Ga. 325, 10 S. E. 349; Lee v. O'Quinn, 103 Ga. 355, 30 S. E. 556; McConnel v. Street, 17 Ill. 253; McCagg v. Heacock, 34 Ill. 476, 85 Am. Dec. 327; Brooks v. Bruyn, 35 Ill. 392; Dalton v. Lucas, 63 Ill. 337; Russell v. Mandell, 73 Ill. 136; Winters v. Haines, 84 Ill. 585; Smith v. Ferguson, 91 Ill. 304; Davis v. Hall, 92 Ill. 85; Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388; Burgett v. Taliaferro, 118 Ill. 503, 9 N. E. 334; Coward v. Coward, 148 Ill. 268, 35 N. E. 759; Sexson v. Barker, 172 Ill. 361, 50 N. E. 109; Moore v. Hinkle, 151 Ind. 343, 50 N. E. 822; Smith v. Young, 89 Iowa, 338, 56 N. W. 506; Wells v. Wells, 30 La. Ann. 935; Clemens v. Meyer, 44 La. Ann. 390, 10 South. 797; Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; Crispen v. Hannavan, 50 Mo. 536; Bradley v. West, 60 Mo. 33; Gaines v. Saunders, 87 Mo. 557; Saxton v. Hunt, 20 N. J. L. 487; Cornelius v. Giberson, 25 N. J. L. 1; Waterhouse v. Martin, 7 Tenn. (Peck.) 392; Texas Land Co. v. Williams, 51 Tex. 51; Latta v. Clifford, 47 Fed. 614.

The term "good faith" will be found most frequently in the Illinois decisions, but in just what sense the words are there used it is difficult to determine. This much is clear, however, that good faith in the acquirement of title does not require ignorance of adverse claims or defects in the title: McCragg v. Heacock, 42 Ill. 153; Simons v. Drake, 179 Ill. 62, 53 N. E. 574; Keppel v. Dreier, 187 Ill. 298, 58 N. E. 396. Yet it seems, according to Davis v. Hall, 92 Ill. 85, that good faith requires that the owner should have a bona fide belief that he is the real owner. In Hardin v. Gouveneur, 69 Ill. 140, 144, it is said that "the faith, whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith."

2. Modification of this Doctrine.—It is not necessary, according to Baucum v. George, 65 Ala. 259, 268, that the claim of right or title should be good or believed to be good. It is enough if there is a real, bona fide purpose to assert and rely upon it as hostile or adverse to that of the real owner, and as the right to the possession. Again, in Lee v. O'Quinn, 103 Ga. 355, 30 S. E. 356, Judge Little uses this language: "An instrument possessing such characteristics as bring it within the definition of color of title as fixed by law is color of title without regard to the good or bad faith of the holder, or without reference to whether he in fact knew of the defects. The question as to whether or not a particular instrument gives color of title does not involve an inquiry into the good faith of the grantee, but it is to be determined solely from the writing which is relied upon as giving color of title. If it were otherwise, and the question of good faith, which is always a question of fact to be determined by the jury, were one of the elements of color of title, it would follow that the question of what constitutes color of title could not be one of law to be determined exclusively by the court. But under our law, although a given paper may constitute color of title, no prescription can be based thereon unless the claimant entered and claimed thereunder honestly and in good faith."

3. Doctrine of Constructive Notice.—In Iowa, it is held that while a tax deed void on its face may give color of title, still such a rule has no application to one who actually knows that he has no claim or title or right to a title. "Adverse possession must be in good faith": Litchfield v. Sewell, 97 Iowa, 247, 66 N. W. 104. Here is made a distinction between actual and constructive notice of the void character of the instrument, which distinction is stated in Foulke v. Bond, 41 N. J. L. 527, as follows: "It is contended, on the part of the plaintiff, that the defendant had constructive notice of the imperfection in his title, on the principle that a party is legally chargeable with knowledge of the contents of deeds in his

chain of title, and therefore was not a purchaser bona fide. But the doctrine of constructive notice does not apply in such a case. There must be proof of actual fraud. Mere neglect to inquire into the state of title is not sufficient evidence of fraud; nor does the rule that what is sufficient to put a party on inquiry operates as notice, apply in such a case; there must be clear and satisfactory proof of knowledge that the title supposed to be acquired was invalid, accompanied by proof of an intent to defraud the real owner." That the doctrine of constructive notice of infirmity of title has no application to the law of adverse possession, see, further, Clapp v. Bromaghan, 9 Cow. 530; Sands v. Hughes, 53 N. Y. 287; Elder v. McClaskey, 70 Fed. 529, 552; Schimpscher v. Stockton, 183 U. S. 290, 22 Sup. Ct. Rep. 107.

4. **Actual Bad Faith or Fraud.**—It has been held that neither fraud in obtaining or continuing possession, nor knowledge on the part of the tenant that his claim is unfounded, wrongful, and fraudulent will excuse the failure to bring an action within the time limited by statute: Warren v. Bowdran, 156 Mass. 280, 31 N. E. 300; Humbert v. Trinity Church, 24 Wend. 587. If the possessor intends a wrongful disseisin, his actual possession for the statutory period gives him title; or, if he occupies what he believes is his own, a similar possession gives him title. "Into the recesses of his mind, his motives or his purposes, his guilt or innocence, no inquiry is made": French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Yetzer v. Thoman, 17 Ohio St. 130, 91 Am. Dec. 122. These cases seem to have been decided without reference to color of title. Yet they contain no implication that the doctrine they announce should be restricted to adverse possession under entry and claim of title merely, nor is any reason for such a restriction apparent. If it be conceded that title fraudulently obtained is not vitiated for the purpose of showing color, probably the rule should be taken with the qualification that the statute will not begin to run against the true owner until he has notice of the fraud. This would be in accordance with the well-known general rule of limitations in cases of fraud: See the cases cited under "Fraudulent Conveyances," post.

5. **Conclusion.**—These conflicting decisions may be ascribed, in some measure, to the varying terms of the different statutes. The hopeless task of harmonizing them, however, we shall not undertake; but, as throwing a flood of light on this much vexed subject, we cannot refrain, in conclusion, from quoting at length from the opinion of Judge Marshall, in Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171. He says: "On this subject there is a conflict of authority, of such long standing and in respect to so many phases of the question, that it is useless to try to reconcile the various adjudications. Such conflict is not merely between different jurisdictions, but is found in the adjudications of the same court, and it may be said that this court is not entirely free from that criticism. This has grown out of the gradual development of

the law from an early period, when it was quite generally held that only occupants in good faith could acquire title by adverse possession, to the rule obviously prescribed by the statute, but reluctantly adopted by the courts, doing entirely away with all necessity for judicial investigation into the hidden motives of the entry or possession and all questions of good faith respecting the same, and substituting instead the rule that open, exclusive, continuous, uninterrupted, hostile possession for the statutory period, whether in good faith respecting boundaries or title, or whether applied to actual possession or actual possession of part accompanied by constructive possession of the balance included in a written instrument upon which the claim of title is based, does the work. The rule that good faith in respect to the validity of the claim of title must characterize the entry and possession is still held in some jurisdictions; in others, it is held that good faith only applies to constructive possession; and, in still others, while the element is held to be indispensable, it is so limited as to be practically done away with. In the late work of Newell on Ejectment, page 788, it is said: 'Good faith in the claimant is an indispensable element in the law of adverse possession. But by the term "good faith," as used in this connection, it must be understood that it involves an inquiry into the party's belief in the character or strength of his title, or whether, in fact, he has any title. What is meant by the term is simply good faith in claiming possession and title, or, in other words, a real intention to claim the land as his own, distinct and hostile to the title of the owner.'

"This only illustrates the tenacity with which text-writers, as well as courts, have clung to the term 'good faith' as an element of adverse possession, in their efforts to harmonize the holdings of different courts on the subject. The case which Mr. Newell cites as authority for the rule as he states it is Davis v. Hall, 92 Ill. 85; and that does not support such rule at all, but says that good faith in such a case requires a sincere belief in the claimant that he is the owner of the premises. To say that good faith is an essential element, and then to limit it to a mere intent to claim title is to eliminate it altogether, as the intent to claim title may exist entirely independent of any element of good faith, as the term has universally been understood.

"In the late case of Chicago etc. R. R. Co. v. Groh, 85 Wis. 641, 55 N. W. 714, Lyon, C. J., said that, to maintain title by adverse possession, good faith is not essential. It is sufficient that the entry of the disseisor is hostile to all the world, that he intends to hold the land as his own, and does hold it for the statutory period of limitations. To be sure, that was said with reference to an entry and claim of title merely, where the possession was actual, not a claim under color of title, or a claim under color of title combining actual possession of a part with constructive possession of the balance described in the written instrument upon which the claim was

based, leaving an opportunity for argument that it does not apply to the latter class of cases; but the language is general, and it may be taken to be the established doctrine of this court that it applies to all cases of adverse possession under the statutes of limitation of this state, whether founded upon claim merely, or upon color of title, and whether the possession is simply possessio pedis, or, in addition, a constructive possession, coextensive with the premises described in a written instrument constituting the color of title. By this, the plain words of the statute are construed according to the obvious legislative intent. There is no middle ground that can be resorted to on this subject. Good faith is an essential element of adverse possession under the statutes of limitation, or it is not. The controversy should be tested and determined by the language of the statutes. We do not find it there in any literal expression—anything to warrant a departure from the plain import of the words used. But if this were not so, and we were to resort to considerations of their reason and spirit, the same result is reached. The statutes of limitation are statutes of repose, and their purpose should not be impaired by injecting into them by judicial construction elements that are not there."

This case was followed in McCann v. Welch, 106 Wis. 142, 81 N. W. 996. The doctrine it announces meets our entire approval, and is a safe guide and rule of decision, provided good faith is not expressly enjoined by the statute. We do not understand that the motive of a claimant is a governing consideration in the law of adverse possession, further than that he must intend to claim the property as his own, to the absolute exclusion of others. Statutes of limitation are not intended to visit a penalty on bad faith, but rather to encourage vigilance. It can be of little consequence to one disseised whether his disseisor was in good or bad faith.

III. Persons Executing Instruments.

a. Grantor without Title.—No matter how defective a grantor's title is, his deed may be color of title. A deed may be color of title, though the grantor is without interest or title in the land conveyed. It matters not whether he has any title, if the general requisites of color of title are present: Williams v. Baldridge, 66 Ala. 332; Gittens v. Lowry, 15 Ga. 336; Stump v. Osterhage, 111 Ill. 82; Clayton v. Feig, 179 Ill. 534, 54 N. E. 149; Nauerth v. Duke (Iowa), 79 N. W. 271; Robison v. Swett, 3 Me. (3 Greenl.) 316; Allen v. Van Bibber, 89 Md. 434, 43 Atl. 758; Sands v. Hughes, 53 N. Y. 287; Harris v. Wells, 85 Tex. 312, 20 S. W. 68; Midkiff v. Stephens, 9 Tex. Civ. App. 411, 29 S. W. 54; Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Stark v. Starr, 1 Saw. 15, Fed. Cas. No. 13,307.

But if a person takes color of title from one whom he knows has no right to make it, he cannot use it as a basis for adverse possession: Lajoye v. Primm, 3 Mo. 529. See, too, Saunders v. Sil-

vey, 55 Tex. 46. And, in Texas, deeds by persons who have already conveyed the land to others, will not support the three years' statute of limitations: Long v. Brenneman, 59 Tex. 210; Illies v. Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915. When one conveys by warranty deed land to which he has no title, and afterward a deed thereof is made to him and he conveys to a second grantee, such deed to him inures to the first grantee. It cannot be relied on by the second grantee as color of title: Guertin v. Mombleau, 144 Ill. 32, 33 N. E. 49. A disseisor cannot obtain color by deeding the land to a third person and taking back a deed to himself: Mylar v. Hughes, 60 Mo. 105.

b. **An Agent's Deed** of his principal's property, while defective as a muniment of title, may constitute color of title within the meaning of the law of adverse possession: Standifer v. Swann, 78 Ala. 88; Payne v. Blockshear, 52 Ga. 637. Thus, the weakness of the power of attorney under which a conveyance is made does not prevent the deed from constituting color: Hawley v. Zigerly, 135 Ind. 248, 34 N. E. 219; Hill v. Wilton, 6 N. C. (2 Murph.) 14. And a deed appearing to have been executed by an attorney in fact is color of title, though unaccompanied by a power of attorney: Connell v. Culpepper, 111 Ga. 805, 35 S. E. 667; Smith v. Allen, 112 N. C. 223, 16 S. E. 932. So is a deed purporting to be made by virtue of a power of attorney, which is not proved: Munro v. Merchant, 28 N. Y. 9; or which, on being produced shows the attorney had no authority to convey land: Hill v. Wilton, 6 N. C. (2 Murph.) 14. But a deed is not available as a foundation for adverse possession, when executed by one assuming to be the attorney of the grantor, without authority, when such want of authority is known to the grantee: Livingston v. Peru Iron Co., 9 Wend. 511. A pretended conveyance by one who assumes to act as agent, but who in fact is without authority, or a deed executed by an attorney in fact after the death of his principal, will not support the plea of the three years statute of Texas: Cox v. Bray, 28 Tex. 247; Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79. See, in connection with this paragraph, "Good Faith," ante.

c. **If One Cotenant** assumes to convey the entire estate, or any specific part of it, apparently doing so, his deed will be color of title; and possession thereunder by the grantee claiming the whole premises will be adverse to the other tenants, and if continued for the statutory period will bar their right to recover: Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Hinchman v. Whetstone, 23 Ill. (185) 108; Hanson v. Ingwaldson, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702; Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54; Sweetland v. Buell, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; Ross v. Durham, 20 N. C. (4 Dev. & B.) 54; Weisinger v. Murphy, 39 Tenn. (2 Head) 674. And where a purchaser claims under a judicial sale, purporting to convey the whole estate, and a deed

in conformity therewith, he has color of title: Amis v. Stephens, 111 N. C. 172, 16 S. E. 17.

d. **A Married Woman's** deed, invalid for failure of her husband to join therein, or for want of a privy examination, is still sufficient to give color of title, so as to render the grantee's possession adverse: Perry v. Lawson, 112 Ala. 480, 20 South. 611; Wright v. Kleyla, 104 Ind. 223, 4 N. E. 16; Sanborn v. French, 22 N. H. 246; Hanks v. Folsom, 79 Tenn. (11 Lea) 555; Fry v. Baker, 59 Tex. 404. See, also, Drane v. Gregory, 42 Ky. (3 B. Mon.) 619. And a deed signed by a married woman with her husband, without her privy examination, is color: Perry v. Perry, 99 N. C. 270, 6 S. E. 86; as when the conveyance is of a homestead: Watson v. Mancill, 76 Ala. 600. Compare Black v. Garner (Tex. Civ. App.), 63 S. W. 918, affirmed in (Tex.), 65 S. W. 876. Moreover, a deed by a wife to her husband will support adverse possession: McCann v. Welch, 106 Wis. 142, 81 N. W. 996.

e. **A Married Man's** deed of his wife's property has been decided to be color of title: McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490; as in case he executes, under a power of attorney, a deed void as against her as a conveyance: Williams v. Bradley (Tex. Civ. App.), 67 S. W. 170. And a surviving husband's deed of his wife's property is color: Kelley v. McKeon, 67 Wis. 561, 31 N. W. 324; but his unauthorized conveyance of the community property is not color of title to the interest vested in her heirs so as to support the three years statute of Texas: Veramendi v. Hutchins, 48 Tex. 531.

f. **The Deed of a Person Non Compos Mentis** is color of title, and possession thereunder for the statutory period will ripen into title against those not under legal disability: Ellington v. Ellington, 103 N. C. 54, 9 S. E. 208, cited with approval in McCann v. Welch, 106 Wis. 142, 81 N. W. 996. So is the deed from the committee of a lunatic a good basis for adverse possession: Clapp v. Bromaghan, 9 Cow. 530; Sands v. Hughes, 53 N. Y. 287.

g. **An Indian's Deed**, when the statutes expressly withhold from him the power of alienation, is not color of title: Smythe v. Henry, 41 Fed. 705. See, also, Taylor v. Brown, 5 Dak. 335, 40 N. W. 525; Jackson v. Porter, 1 Paine, 457, Fed. Cas. No. 7,143. But where, after the execution of the deed, the restriction on the power of alienation is removed, the statute from that time begins to run against the grantor and his heirs: Schrimpsher v. Stockton, 58 Kan. 758, 51 Pac. 276, affirmed in 183 U. S. 290, 22 Sup. Ct. Rep. 107.

IV. Instruments Executed and Properties Transferred.

a. Contract to Convey.

1. **In Writing.**—A bond for a deed or title, or an executory contract for the sale of land, after performance on the part of the vendee and the accruing right to a deed, is usually considered sufficient color of title whereupon to base the defense of adverse pos-

session: Farley v. Smith, 39 Ala. 38; Beard v. Ryan, 78 Ala. 37; Tumlin v. Perry, 108 Ga. 520, 34 S. E. 171; Spitler v. Scofield, 43 Iowa, 571; La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463; Briggs v. Prosser, 14 Wend. 227; Brown v. Brown, 106 N. C. 451, 11 S. E. 647; Simpson v. Sneclode, 83 Wis. 201, 53 N. W. 499. However, if such bond or contract is purely executory, entitling the vendee to a deed at some future day in case of his compliance with certain conditions, it is not color of title. It does not purport to convey: Rigor v. Frye, 62 Ill. 507; Burns v. Edwards, 163 Ill. 494, 45 N. E. 113; Osterman v. Baldwin, 6 Wall. 116, 124. See, also, Dale v. Good, 2 Over. 394; Norris v. Ellis, 7 Humph. 463; Winters v. Laird, 27 Tex. 616. Though it has been held that one who enters into possession under a contract of purchase with a bond for title when the purchase money is paid is in under color, as against a stranger, though the purchase money has not been paid: Fain v. Garthright, 5 Ga. 6; Elliott v. Mitchell, 47 Tex. 445. A written contract to convey is color to an assignee thereof: Alderman v. Boeken, 25 Kan. 658. But a bond for title can give color only to the obligee or his assignee: Roe v. Kersey, 32 Ga. 152.

2. In Parol.—One in possession of lands under a parol contract to convey, especially when he has paid the purchase price, may protect his possession under the statute of limitations: Pendergast v. Gullatt, 10 Ga. 219; Pope v. Brassfield, 22 Ky. App. 1613, 61 S. W. 5; Magee v. Magee, 37 Miss. 138; Baker v. Hale, 6 Baxt. 46. We do not consider these cases, however, as holding such a contract to be color of title: See a further consideration of this question under "Necessity of Writing," ante.

b. A Quitclaim Deed is as effectual to pass title as a deed containing full covenants. It is true that such deed conveys only what the grantor rightfully can convey, but it is as effectual to transfer that as any other form of deed. A bargain and sale deed cannot enlarge the estate granted, but only purports to pass the title of the grantor. This, by another form of expression, a quitclaim deed does. Both purport, independently of the covenants, to accomplish the same thing. It follows that a deed of release is good as color of title in aid of adverse possession: McCamy v. Higdon, 50 Ga. 629; Hammond v. Crosby, 68 Ga. 767; Johnson v. Girtman (Ga.), 42 S. W. 96; Holloway v. Clark, 27 Ill. 483; Busch v. Huston, 75 Ill. 343; Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; Tremaine v. Weatherby, 58 Iowa, 615, 12 N. W. 609; Sanders v. Riedinger, 51 N. Y. Supp. 937, 30 App. Div. 277, affirmed in 164 N. Y. 564, 58 N. E. 1092; Swift v. Mulkey, 14 Or. 59, 12 Pac. 76; McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490; Parker v. Newberry, 83 Tex. 428, 18 S. W. 815. But a quitclaim deed by one not shown to have color of title or possession is not color: Woods v. Banks, 14 N. H. 101. See, in this connection, Laraway v. Zenor, 100 Iowa, 181, 69 N. W. 416.

c. **Mortgage and Deed of Mortgaged Property.**—A deed absolute on its face, purporting to convey mortgaged premises, executed by the mortgagor to the mortgagee for a valuable consideration, is color of title: McCagg v. Heacock, 84 Ill. 476, 85 Am. Dec. 327; S. C., 42 Ill. 153. And where a mortgagee assumes to convey the fee to the land by a warranty deed, the possession of the grantee becomes adverse to all the world: Stevens v. Brooks, 24 Wis. 326. If the plea of the statute is available only to one claiming "under a deed," such a plea cannot be availed of by one claiming under absolute deeds, which, in fact are mortgages, and are so known by the defendant: Massie v. Meeks (Tex. Civ. App.), 28 S. W. 44. See "Foreclosure Deeds," post.

d. **Homestead Transfer.**—A deed of part of a homestead by a married man, executed by him alone, being void, is not color of title within the three years statute of Texas; still it may form the basis, as against his wife, of the five and ten year statutes: Watson v. Watson (Tex. Civ. App.), 55 S. W. 183. See, also, Hussey v. Moser, 70 Tex. 42, 7 S. W. 606; Garner v. Black (Tex.), 65 S. W. 876. And a deed by a husband and wife of the homestead, void for want of a certificate of acknowledgment showing her voluntary assent and signature, is color of title to show the extent of the grantee's claim: Watson v. Mancill, 76 Ala. 600. Compare Black v. Garner (Tex. Civ. App.), 63 S. W. 918, affirmed in (Tex.), 65 S. W. 876. A deed reciting that the land thereby conveyed has been set aside as a homestead to the grantor, and having attached thereto the approval of the ordinary that the sale be made, is admissible in evidence as color of title: Connell v. Culpepper, 111 Ga. 805, 35 S. E. 667. And one who has purchased a soldier's "additional homestead right," located it under powers of attorney, and entered into possession of the land upon which the location was made, has color of title to the entire tract described in the receiver's receipt: Draper v. Taylor, 58 Neb. 787, 79 N. W. 709.

Proceedings assigning to one his homestead do not constitute color of title. The assignment is in no sense a conveyance of land, nor does it profess to pass any title whatever. It has no other effect than simply to attach to the owner's existing estate a quality of exemption. It in no way changes his title, nor creates in him a new estate: Keener v. Goodson, 89 N. C. 273.

e. **Fraudulent Conveyance.**—If a grantor is justly chargeable with fraud, at least when the grantee does not participate therein, and receives the conveyance without knowledge thereof, there is no doubt but that the deed gives color of title under the statute of limitations. Deeds made in fraud of creditors perhaps furnish the most frequent application of this principle: Conyers v. Kenan, 4 Ga. 308, 48 Am. Dec. 226; Wingfield v. Virgin, 51 Ga. 139; Harper v. Tapley, 35 Miss. 506; Hoke v. Henderson, 14 N. C. (3 Dev.) 12; Reeves v. Dougherty, 7 Yerg. 222, 27 Am. Dec. 496; Blantin v. Whitaker, 11 Humph. 313; Gregg v. Sayre, 8 Pet. 244. It has been

held, however, that a deed in fraud of the grantor's creditors is not color of title as a starting point for the statute of limitations until they have notice of the fraud: Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79; Farrar v. Bernheim, 74 Fed. 435.

f. **A Forged Writing** may be the foundation of a bona fide claim of right and color of title, but not without it is believed to be genuine: Griffin v. Stamper, 17 Ga. 108; Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628; Hunt v. Dunn, 74 Ga. 120; Parker v. Waycross etc. Ry. Co., 81 Ga. 387, 8 S. E. 871; as, for example, a forged bond for a title: Millen v. Stines, 81 Ga. 655, 8 S. E. 315. But a forged deed is not color under the three years Texas statute: Macdonnell v. De Los Fuentus, 7 Tex. Civ. App. 136, 26 S. W. 792; League v. Atchison, 6 Wall. 112. And a forged deed, or a deed under a forged letter of attorney, will not support the plea of limitation under the five years statute of that state, though it will the ten years statute: Moses v. Dibrell, 2 Tex. Civ. App. 457, 21 S. W. 414. A patent upon a valid land certificate, though issued to one claiming under a forged transfer of the certificate, conveys title within the three years statute: League v. Rogan, 59 Tex. 427.

Making an alteration in a deed by the grantor at the grantee's request after delivery does not destroy the deed as color of title: Sanitary Dist. v. Allen, 178 Ill. 330, 53 N. E. 109.

g. **A Devise of Land** may constitute color of title: Holbrook v. Forsythe, 112 Ill. 306; Trustees of University v. Blount, 4 N. C. (Tayl. Term.) 13, (455); Evans v. Satterfield, 5 N. C. (1 Murph.) 413; Holloway v. Jones, 143 Pa. St. 564, 22 Atl. 710; Cox v. Peck, 11 Tenn. (3 Yerg.) 435; though ineffectual to pass title: Pettit v. Black, 13 Neb. 142, 12 N. W. 841; or void: Charle v. Saffold, 13 Tex. 94. And devisees holding possession of land under a will proved and recorded for the statutory period will gain title although the will is afterward set aside: Brown v. Brown, 14 Lea, 253, 52 Am. Rep. 169. In North Carolina it has been held that a copy of an alleged will taken from the book of records of wills in a county is not color of title: Sutton v. Westcott, 3 Jones, 283; and that a writing purporting to be a will of lands, having but one subscribing witness, and not having been proved as a will, is not color; though a writing purporting to be a will and proved by the oath of one witness is color of title to the lands therein disposed of: Callender v. Sherman, 5 Ired. 711; McConnell v. McConnell, 64 N. C. 342. Evidence of a will that has not been probated nor acted upon as conferring any right, is not admissible as color of title: Rothschild v. Hatch, 54 Miss. 554.

h. **A Descent Cast** upon heirs by the death of their ancestor, who dies in possession, gives them color of title. And this, though he had only color of title to the land, or was a mere trespasser. The possession thereby devolved upon and continued by them is under color: Holbrook v. Forsythe, 112 Ill. 306; Hamilton v. Wright,

30 Iowa, 480; Teabout v. Daniels, 38 Iowa, 158; Miller v. Davis, 106 Mich. 300, 64 N. W. 338; Hubbard v. Wood, 1 Sneed, 279, 285; King v. Rowan, 10 Heisk. 675.

i. **Dower Transfer.**—If a woman and her second husband convey an undivided one-third of land that has descended to her as widow from her first husband, the deed is sufficient to give color of title against the grantors, assuming it to be void: Irey v. Markey, 132 Ind. 546, 32 N. E. 309. And where a widow conveys her dower interest before it is assigned to her, the adverse possession of the vendee for the statutory period gives him title: Barnett v. Meacham, 62 Ark. 313, 35 S. W. 533.

j. **Other and Miscellaneous Cases.**—The following acts, agreements, and instruments have been considered color of title: A deed to a purchaser by a wrong name, it being intended for him and he going into possession thereunder: Elston v. Kennicott, 46 Ill. 187; a deed to one entering into possession which is afterward adjudged void and set aside for want of delivery by the grantor: Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886; a trustee's deed without the privy examination of the cestui que trust, though the latter is a feme covert: Smith v. Allen, 112 N. C. 223, 16 N. E. 932; a deed of a railroad by the company as a right of way: St. Louis etc. R. R. Co. v. Warfel, 163 Ill. 641, 45 N. E. 169; a deed executed prior to an execution sale to the defendant therein, where he denies the validity of such sale and claims under the deed: Gaines v. Saunders, 87 Mo. 557; a transfer on the back of a deed: Conyers v. Kenan, 4 Ga. 308, 48 Am. Dec. 226; a junior grant: Middlesborough Waterworks Co. v. Neal, 20 Ky. Law Rep. 1403, 49 S. W. 428; a lost deed which was executed and delivered and whose contents are proved: Harbison v. School Dist. No. 1, 89 Mo. 184, 1 S. W. 30; compare Marsh v. Sevin, 28 La Ann. 326; Hornsby v. Davis (Tenn.), 36 S. W. 159; an instrument ambiguous as to whether it should be construed as conveying lands in praesenti or as a testamentary paper: Westmoreland v. Westmoreland, 92 Ga. 233, 17 S. E. 1033; an instrument intended as a complete relinquishment of title, though it is doubtful, on its face, whether it should be construed as a deed or mortgage: Schlawig v. Purslow, 59 Fed. 848; a letter: Wooding v. Blanton, 112 Ga. 509, 37 S. E. 720; an indication of boundaries with stakes: Allen v. Johnson, 2 McMull. 495; and a vote of a town to convey land, accompanied by entry, is evidence of title without a deed; and an oral agreement for the exchange of lands, followed by occupation thereunder, will ripen into a title under the statute of limitations, although mutual deeds are not given: Alexander v. Wheeler, 78 Ala. 167; Martin v. Main Cent. R. R. Co., 83 Me. 100, 21 Atl. 740. But see Tennessee Coal etc. Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108, 26 South. 245. For color of title to public lands, see the monographic note to Schneider v. Hutchinson, 76 Am. St. Rep. 483-490.

The following instruments, titles, and acts have been held not color of title: A deed in violation of an express statute: Smythe v. Henry, 41 Fed. 705; a deed delivered in escrow, finally rejected and destroyed: Chastien v. Philips, 33 N. C. (11 Ired.) 255; a certified copy of the record of a deed which does not contain the name of the grantee, although a marginal entry on such record by the clerk gives the names of the grantee and grantor, under the three years Texas statute: Nelson v. Cooper, 108 Fed. 919; application for the purchase of school lands: Besson v. Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; a title devested by a decree of court: Sholl v. German Coal Co., 139 Ill. 21, 28 N. E. 748 (see, also, Lebanon Min. Co. v. Rogers, 8 Colo. 34, 39, 5 Pac. 661); a statutory duty: Schrimper v. Chicago etc. Ry. Co. (Iowa), 82 N. W. 916; an ordinance of a town, not under seal, nor expressing a consideration, nor delivered to the parties claiming under it: Commissioners of Beaufort v. Duncan, 46 N. C. (1 Jones) 239; a private survey and map, never recorded, and not referred to or made a part of the deed under which the party relying on it claimed, though they are proper evidence to show the character of the claim of right or title: Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232; and a deed is not color of title to a possession ended before the deed was made: Cooper v. Ord, 60 Mo. 420; nor is it color beyond the estate which it purports to pass: McRae v. Williams, 52 N. C. (7 Jones) 430; nor when so plainly defective that no one of ordinary capacity could be misled by it: Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

V. Instruments Based on Judicial Proceedings.

a. A Decree or Judgment may be admissible as color of title in support of a claim by adverse possession, notwithstanding such irregularities as render it inadmissible as evidence of title: Brind v. Gregory, 122 Cal. 480, 55 Pac. 250. A decree affirming a chancery sale and vesting title in the purchaser is color of title: Patton v. Dixson, 105 Tenn. 97, 58 S. W. 299. So a decree in chancery declaring that certain described lands, title to which is in the defendant, shall be held by him in trust for the use of the plaintiff, is admissible in evidence as color of title, upon which the plaintiff and those claiming under him may base a claim to a prescriptive title: Wardlaw v. McNeill, 106 Ga. 29, 31 S. E. 785. But a void judgment is not color of title under the three years Texas statute: Latimer v. Logwood (Tex. Civ. App.), 27 S. W. 960. See, also, Morgan v. Baker (Tex. Civ. App.), 40 S. W. 27. On the other hand, a decree against the title of a defendant not only devests his title, but also any color of title he may have had prior to the decree: Scholl v. German Coal Co., 139 Ill. 21, 28 N. E. 48.

b. Judicial Sale—Officer's Deed.—Void judicial proceedings may give color of title: Sims v. Gay, 109 Ind. 501, 9 N. E. 120. And a sheriff or other officer's deed, inoperative as a conveyance of title because of the invalidity of the judgment, or sale, or defects in

the instrument itself, may support adverse possession. Even if founded on a void judgment or judicial sale, such deed may constitute color of title if fair on its face: Bernheim v. Horton, 103 Ala. 380, 15 South. 822; Packhard v. Moss, 68 Cal. 123, 8 Pac. 818, 825; Beverly v. Burke, 14 Ga. 70; Laflin v. Herrington, 16 Ill. 301; Fritz v. Joiner, 54 Ill. 101; Sexson v. Barker, 172 Ill. 361, 50 N. E. 109; Second Nat. Bank v. Corey, 94 Ind. 457; Goodman v. Nichols, 44 Kan. 22, 23 Pac. 957; Leduf v. Bailly, 3 La. Ann. 8; Brien v. Sargent, 13 La. Ann. 198; Stackhouse v. Zuntz, 41 La. Ann. 415, 6 South. 666; Shumate v. Snyder, 140 Mo. 77, 41 S. W. 781; Northrop v. Wright, 7 Hill, 476; Falls of Neuse Mfg. Co. v. Brooks, 106 N. C. 107, 11 S. E. 456; Mullan v. Carper, 37 W. Va. 215, 16 S. E. 527; Whiteside v. Singleton, 19 Tenn. (1 Meigs) 207; Hitchcox v. Morrison, 47 W. Va. 206, 34 S. E. 993; North v. Hammer, 34 Wis. 425; East Tennessee Iron etc. Co. v. Wiggin, 68 Fed. 446; Pike v. Evans, 94 U. S. 6.

It has been held that a sheriff's deed unaccompanied by the judgment or execution under which the property was sold is color of title: Kendrick v. Latham, 25 Fla. 819, 6 South. 871; Hammon v. Crosby, 68 Ga. 767; Riggs v. Dooley, 46 Ky. (7 B. Mon.) 236. And a sheriff's deed without a seal is color: Kruse v. Wilson, 79 Ill. 233; Hamilton v. Baggess, 63 Mo. 233. So such deed is color of title, though no entry on the execution is made of a search and failure to find personalty: Wade v. Garrett, 109 Ga. 270, 34 S. E. 572. A deed by a clerk, after going out of office, as to a sale made while he was in office, is color: Williams v. Council, 49 N. C. (4 Jones) 206. Compare Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662. Though a deed begun by one sheriff and finished by his successor is color only from the date of its completion: Walls v. Smith, 19 Ga. 8. There is color of title where one purchases at an execution sale against another at the latter's request, and then reconveys to him: Rogers v. Mabe, 15 N. C. (4 Dev.) 180.

c. **Sheriff s Receipt and Memorandum.**—Evidence of a sheriff's sale in the form of memoranda made in the officer's book and his receipt for the purchase money is sufficient to constitute color of title in aid of adverse possession, color of title being considered anything connected with the title that serves to define the extent of the claim: Field v. Boynton, 33 Ga. 239.

d. **A Sheriff's Return** of execution showing a sale, a description of the land sold, the purchaser's name, and the payment of the purchase price, is such color of title as will by adverse possession ripen into a perfect title: Neal v. Nelson, 117 N. C. 393, 53 Am. St. Rep. 590, 26 S. E. 428. And an entry by the sheriff on the fieri facias of the levy, sale, and purchase of the land is color: Walls v. Smith, 19 Ga. 8. Compare Dobson v. Murphy, 18 N. C. (1 Dev. & B.) 586, which is commented on in Neal v. Nelson, 117 N. C. 393, 53 Am. St. Rep. 590, 26 S. E. 428.

e. **Foreclosure Deeds.**—Possession taken under a mortgage before foreclosure, because of failure to pay interest or for other de-

fault, is not with color of title: Johnson v. Davidson, 162 Ill. 232, 44 N. E. 499. But when there is an attempt, unconnected with fraud, to foreclose, and a decree is rendered and a sale had, while the decree or conveyance may be erroneous or even void, still it shows an intention to change the relations of the parties from mortgagee and mortgagor to that of claim of separate and independent rights. Then the deed constitutes color of title, and the relations of the parties become hostile: Chickering v. Failes, 26 Ill. 508; Hinkley v. Greene, 52 Ill. 223; Mason v. Ayres, 73 Ill. 121; Souders v. Jeffries, 107 Ind. 552, 8 N. E. 288; Clark v. Clough, 65 N. H. 43, 23 Atl. 526; H. B. Claflin Co. v. Middlesex Bank Co., 113 Fed. 958. The same is true where a sale is made under a deed of trust given as security. However inadequate the conveyance may be to carry the true title, it may be color: Gibhard v. Sattler, 40 Iowa, 152; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Gottlieb v. Thatcher, 51 Fed. 373; Stout v. Rigney, 107 Fed. 545.

f. An Executor's or Administrator's Deed of the land of his decedent comes within the rule that an instrument, without virtue as a conveyance or muniment of title, may, if apparently regular and purporting to convey the property, constitute color of title under which a title by adverse possession may be gained: Collins v. Smith, 18 Ill. 160; Kelly v. Donlin, 70 Ill. 378; Brian v. Melton, 125 Ill. 647, 18 N. E. 318; Vancleave v. Milliken, 13 Ind. 105; Irey v. Mater, 134 Ind. 238, 33 N. E. 1018; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Crispen v. Hannavan, 50 Mo. 536; McCulloh v. Daniel, 102 N. C. 529, 9 S. E. 413; McMillan v. Gambill, 106 N. C. 359, 11 S. E. 273; Balkham v. Woodstock Iron Co., 43 Fed. 648. Thus, a deed of an administrator is color when defective because the judge was disqualified: Halbert v. Martin (Tex. Civ. App.), 30 S. W. 388; or because the sale was made under an unconstitutional statute: Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Fayan v. Rosier, 68 Ill. 84; or because the decedent's title was only permissive in its inception: Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 South. 349. A sale may be so radically defective, however, that the deed will not be color: Casey v. Morgan, 67 Ala. 441; Ford v. Mills, 46 La. Ann. 331, 14 South. 845. And an administrator's sale has been held not color of title when not followed by a deed: Livingston v. Pendergast, 34 N. H. 544. A void deed by an administrator, not in his representative capacity, may be color of title: Riggs v. Fuller, 54 Ala. 141. And where a third person purchases at an administrator's sale at the request of the administrator, and then reconveys to him in his own right, the deed thus obtained is color: Sloan v. Graham, 85 Ill. 26.

g. A Guardian's Deed of the land of his ward, made in conformity with a decree of the court of probate for the sale of the property, though the sale or the proceedings therefor are void, may be color of title in favor of the purchaser or his grantee in possession under the conveyance: Molton v. Henderson, 62 Ala. 426; Walker v.

Hill, 111 Ind. 223, 12 N. E. 387. It is otherwise, in Illinois, where no return of the sale and conveyance was made by the guardian to the circuit court, and no order was passed by that court approving and recording a return, the deed, in such case, not being prima facie title: Rawlings v. Bailey, 15 Ill. 178.

h. Partition Proceedings.

1. By Decree of Court.—A decree of a competent court for partition is color of title, even if it does not devest and vest title. Partition constitutes color of title as much as any defective instruments that have been so deemed: Brind v. Gregory, 120 Cal. 640, 53 Pac. 25; Watson v. Kelty, 16 N. J. L. 517; Bynum v. Thompson, 25 N. C. (3 Ired.) 578; Smith v. Tew, 127 N. C. 299, 37 S. E. 330; Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811; Johnson v. Britt, 9 Heisk. (Tenn.) 756; Duncan v. Gibbs, 1 Yerg. 236; Tellico Mfg. Co. v. Williams (Tenn.), 59 S. W. 1075. Compare Kernan v. Baham, 45 La. Ann. 799, 13 South. 155. A partition decree purporting on its face to convey title is color, though some of the tenants in common were not made parties: Hassett v. Ridgely, 49 Ill. 197; Rawson v. Fox, 65 Ill. 200; Sontag v. Bigelow, 142 Ill. 143, 31 N. E. 674; Wright v. Stice, 173 Ill. 571, 51 N. E. 71.

2. Without a Decree of Court.—A deed or agreement for partition voluntarily entered into by the parties is equally efficacious as color of title: Shiels v. Lamar, 58 Ga. 590; Richards v. Williams, 3 Baxt. 186; Thurston v. University of North Carolina, 4 Lea, 513. And a partition among devisees, made under a will, which gives each devisee a fee in the devised lands constitutes an assurance of title, although the testator had no title, or, at most, a mere possessory title to the land: Thurston v. University of North Carolina, 4 Lea, 513.

i. Tax Deeds and Certificates.

1. Tax Deeds in General.—A tax deed is color of title: Fleming v. Moore, 122 Ala. 399, 26 South. 174; Kile v. Fleming, 78 Ga. 1; Morrison v. Norman, 47 Ill. 477; Scott v. Delaney, 87 Ill. 148; Boyle v. West, 107 La. 347, 31 South. 794; Smith v. Johnson, 107 Mo. 494, 18 S. W. 21; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Villareal v. McLaughlin (Tex. Civ. App.), 62 S. W. 98; Gillaspie v. Murray (Tex. Civ. App.), 66 S. W. 252; Mattison v. Walker, 1 Biss. 62, Fed. Cas. No. 9297. Though it is ineffectual to convey title to the purchaser, because of defects in the assessment, irregularities leading up to or in the sale, or defects in the form or substance of the instrument itself, still it may constitute color of title. While worthless as a muniment of title, it may be admissible in evidence to show the boundaries and mark the extent of the occupant's possession: Dillingham v. Brown, 38 Ala. 311; Stovall v. Fowler, 72 Ala. 77; Doe ex dem. Hooper v. Clayton, 81 Ala. 391, 2 South. 24; National Bank v. Baker Iron Co., 108 Ala. 635, 19 South. 47; Pillow v. Roberts, 12 Ark. 822; Elliott v. Pearce, 20 Ark. 508; Cofer v. Brooks, 20

Ark. 542; McConnell v. Sweptson, 66 Ark. 141, 49 S. W. 566; Reynolds v. Lincoln, 73 Cal. 191, 14 Pac. 674; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; De Foresta v. Gast, 20 Colo. 307, 38 Pac. 244; Woodward v. Blanchard, 16 Ill. 424; Whitney v. Stevens, 89 Ill. 53; Lewis v. Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Taylor v. Hamilton, 173 Ill. 392, 50 N. E. 1064; Duck Island Club v. Baxstead, 174 Ill. 435, 51 N. E. 831; Edwards v. Sims, 40 Kan. 235, 19 Pac. 710; Michel v. Stream, 48 La. Ann. 341, 19 South. 215; Jopling v. Chachere, 107 La. 522, 32 South. 243; Hoffman v. Harrington, 28 Mich. 90; Hardy v. Powell, 40 Mich. 413; Reilly v. Blaser, 61 Mich. 399, 28 N. W. 151; Harrison v. Spencer, 90 Mich. 586, 51 N. W. 642; Washburn v. Cutter, 17 Minn. 361; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Brougher v. Stone, 72 Miss. 647, 17 South. 509; Pharis v. Bayless, 122 Mo. 116, 26 S. W. 1030; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Finlay v. Cook, 54 Barb. 9; Seemuller v. Thornton, 77 Tex. 156, 13 S. W. 846; Smith v. Kenney (Tex. Civ. App.), 54 S. W. 801; Lennig v. White (Va.), 20 S. E. 831; Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740; Pillow v. Roberts, 13 How. 472; Van Gunden v. Virginia Coal etc. Co., 52 Fed. 838; Bartlett v. Ambrose, 78 Fed. 839.

2. **Deeds Void on Their Face.**— A tax deed void upon its face cannot, according to some authorities, constitute color of title, at least under the short or special statutes of limitations enacted in many of the states: Waterson v. Devoe, 18 Kan. 223; Hall v. Dodge, 18 Kan. 277; Mason v. Crowder, 85 Mo. 526; Moore v. Brown, 11 How. 414; Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. Rep. 83. "A tax deed, to be sufficient when recorded, to set the statute of limitations in operation must of itself be prima facie evidence of title. It is not necessary that it be sufficient to withstand all evidence brought against it to show that it is bad; but it must appear to be good upon its face. When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No statute of limitations can then be brought to aid its validity": Shoat v. Walker, 6 Kan. 65, 74.

However, it is believed that the fact that a deed is void on its face should not be an insuperable obstacle to its constituting color of title, particularly under general statutes of limitation. Certainly, a tax deed is color of title, notwithstanding a person of legal learning may, by a critical examination, discover defects therein fatal to its validity: De Foresta v. Gast, 20 Colo. 307, 38 Pac. 244. It has often been held that a tax deed void on its face may, nevertheless, be color of title, if it purports to convey the land and contains a description of it: Pugh v. Youngblood, 69 Ala. 296; Wilson v. Atkinson, 77 Cal. 485, 11 Am. St. Rep. 299, 20 Pac. 66; Brinker v. Union Pac. Ry. Co., 11 Colo. App. 166, 55 Pac. 207; Dalton v. Lucas, 63 Ill. 337; Colvin v. McCune, 89 Iowa, 508; Litchfield v. Sewell, 97 Iowa, 247, 66 N. W. 104; Miesen v. Canfield, 64

Minn. 513, 67 N. W. 632; Bartlett v. Kauder, 97 Mo. 356, 11 S. W. 67; Power v. Kitching (the principal case), 10 N. Dak. 254, ante, p. 691, 86 N. W. 737; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473; Whittlesey v. Hoppengan, 72 Wis. 140, 39 N. W. 355; Hoge v. Magnes, 85 Fed. 355.

A distinction is expressly made in the Missouri cases between special and general statutes of limitation, so far as concerns tax deeds void on their face. Such deeds, according to these cases, are color of title under the general, but not under the short or special, statute: Mason v. Crowder, 85 Mo. 526; Bartlett v. Kauder, 97 Mo. 356, 11 S. W. 67. Many of the cases holding these deeds insufficient as color of title will be found to be decided under the short or special statutes.

3. Illustrations.—In the following cases it has been decided that a tax deed is color of title: Where the sale was without advertisement: Doe v. Hearick, 14 Ind. 242; where there was no valid judgment and precept: Winstanley v. Meacham, 58 Ill. 97; where the sale was made at a time or place other than that authorized or fixed by law: Bennett v. North Colorado etc. Imp. Co., 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812; Hardin v. Crate, 60 Ill. 215 (compare Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. Rep. 83); where the deed does not recite the place of the sale: Gatling v. Lane, 17 Neb. 77, 80, 22 N. W. 227, 453; where the deed is unacknowledged: Reddick v. Long, 124 Ala. 260, 27 South. 402; where attention is called to defects in the deed: White v. Farris, 124 Ala. 461, 27 South. 259; where the land was not taxable, the title being in the United States: Chicago etc. Ry. Co. v. Allfree, 64 Iowa, 500, 20 N. W. 779 (compare Durham v. Hussman, 88 Iowa, 29, 55 N. W. 11); and where the land, at the time of the execution of the deed, had become a part of another county: Hubbard v. Godfrey, 100 Tenn. 150, 47 S. W. 81.

On the other hand, it has been held there was not color of title where there was a void sale not followed by a deed: Langdon v. Templeton, 68 Vt. 173, 28 Atl. 966; where the levy by virtue of which the sale was made was not authorized at the time: Allen v. Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200; where the deed was void for uncertainty, or did not purport to convey the land: Berrendo Stock Co. v. Kaiser, 66 Tex. 352, 1 S. W. 257; where the deed was to a partnership in the firm name: Burns v. Edwards, 163 Ill. 494, 45 N. E. 112; where a cotenant, by the rents and profits of the common property, procured to himself a tax deed of the whole estate: Bender v. Stewart, 75 Ind. 89; and where the deed was executed before the expiration of the time for redemption: Bowman v. Wettig, 39 Ill. 416.

4. Time from Which Color Dates.—Color of title under a tax deed has been held to date from the date of the deed, and not from the date of the sale: De Graw v. Taylor, 37 Mo. 310. See, too, Holden v. Collins, 5 McLean, 189, Fed. Cas. No. 6599. In Texas

the five years statute does not begin to run until the deed is filed: Taylor v. Brymer, 17 Tex. Civ. App. 517, 42 S. W. 999. See, in this connection, "Certificates of Purchase," post; "Recording and Registration," ante.

5. Certificates of Purchase.—In some jurisdictions a certificate of purchase issued on a tax sale does not constitute color of title, and a tax deed subsequently issued does not relate so as to constitute color before the actual execution of the deed: Harrell v. Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; McKeighan v. Hopkins, 14 Neb. 361, 15 N. W. 711. But in Tennessee a tax certificate describing the boundaries of the premises is color: Winters v. Hainer (Tenn.), 64 S. W. 44. And in Arkansas it is held that a certificate of purchase is color, since the statute makes the sale, and not the deed, the investiture of title so far as adverse possession is concerned: Worthen v. Fletcher, 64 Ark. 662, 42 S. W. 900.

6. The Deed of a Tax Purchaser to one without notice of irregularities in the tax sale is color of title: Collins v. Boring, 96 Ga. 360, 23 S. E. 401; Lewis v. Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384. And such deed may be color, though the tax purchaser himself has received no deed: Millett v. Lagomarsino, 107 Cal. 102, 40 Pac. 25; McVey v. Carr, 159 Mo. 648, 60 S. W. 1034. A quitclaim deed from one who has purchased at a tax sale is color, although the collector's deed conveyed no title, but was color of title: Minot v. Brooks, 16 N. H. 374; Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575. See, also, McVey v. Carr, 159 Mo. 648, 60 S. W. 1034.

7. Condemnation Proceedings by a railroad company for a right of way constitute color of title under which a title may be acquired by adverse possession, notwithstanding such proceedings are invalid for irregularities of procedure: Mobile etc. R. R. Co. v. Cogsbill, 85 Ala. 456, 5 South. 138; as for want of sufficient notice: Keener v. Union Pac. Ry. Co., 21 Fed. 128.

McCARDIA v. BILLINGS.

[10 N. Dak. 373, 87 N. W. 1008.]

ACKNOWLEDGMENT.—COURTS CONSTRUE the language of certificates of acknowledgments liberally, and uphold them if it can be done by a fair and reasonable construction. But no intendments or presumptions are indulged in their favor. (pp. 732, 733.)

ACKNOWLEDGMENT—CLERICAL ERROR.—A certificate of acknowledgment reciting that A and B appeared before the notary, and were known by him to be "the person who are described in and who executed" the foregoing instrument, and acknowledged "that he executed the same," is not fatally defective. (pp. 731, 734.)

A CERTIFICATE OF ACKNOWLEDGMENT WILL BE UPHELD as against the unsupported evidence of the person certified to have executed it. (p. 734.)

MORTGAGE FORECLOSURE—MISTAKE IN DATE.—The fact that the notice of a foreclosure sale, and all papers subsequently executed by the sheriff in respect thereto, give the date of the mortgage incorrectly, does not render the foreclosure void. (pp. 735, 736.)

FORECLOSURE BY ADVERTISEMENT.—A SUBSTANTIAL COMPLIANCE with the statute regulating what a notice of foreclosure by advertisement must contain is sufficient. (p. 736.)

ACKNOWLEDGMENT CURED BY STATUTE.—An acknowledgment of a foreclosure sale by a deputy sheriff, irregular in not being made on behalf of the sheriff as well as for himself, is cured by section 3585 of the Revised Codes of North Dakota. (pp. 737, 738.)

Spencer & Sinkler and Tracy R. Bangs, for the appellant.

C. J. Murphy, for the respondents.

376 MORGAN, J. This action was instituted for the purpose of determining conflicting claims to the real estate described in the complaint, and for the purpose of securing possession of such real estate. The complaint is in the usual form in such actions, and sets up the ownership of the lands by plaintiff, and that the defendants are in possession thereof, and claim an estate and interest therein adverse to the plaintiff, and that such claim is without any right, and their possession wrongful. The answer alleges that the defendants, Christopher C. Billings and Rebecca E. Billings are in possession of said premises, and entitled to the possession of the same, under the following facts: That on the tenth day of October, 1884, one William McCardia and Margaret McCardia made and delivered their joint mortgage of the premises described to one Joseph Chapman, which said mortgage was by them duly acknowledged, and which was duly recorded in the office of the register of deeds of Pembina county on the sixteenth day of October, 1884. That default was made in the payment of said mortgage, and that said mortgage was by the said Chapman duly foreclosed and sold under a power of sale contained in said mortgage; and that such foreclosure and sale were conducted in accordance with all the conditions and terms of such power of sale, and in compliance with all the provisions of the statute pertaining to foreclosure of mortgage under powers of sale by advertisement. That one Sarah Chapman was the purchaser of said lands under such foreclosure sale on the eighth day of January, 1886. That she received a deed of said lands from the sheriff of said county after the one year pro-

vided by law for a redemption from such sale had expired, and on the 25th day of January, 1887. That she immediately thereafter went into possession of such lands, and remained in possession of the same until the fourteenth day of January, 1889, when she conveyed the same, by deed of warranty, to one Barnaby, and said Barnaby reconveyed said lands to Sarah Chapman [377] on the first day of September, 1893, and that she remained the owner and in possession thereof until about April 23, 1895, when she sold and conveyed the same to the defendants Billings by a contract for a deed under the crop payment plan; and that said Billings immediately went into possession of said lands under said contract to purchase, and remained in possession thereof continuously ever since. That on June 17, 1899, the said Sarah Chapman conveyed said premises to the defendant Rebecca Billings by a deed of general warranty, pursuant to the provisions of said contract of purchase entered into in April, 1895. The answer further alleges that the defendant George B. Clifford is the owner of one certain mortgage given to him by the defendants C. C. Billings and Rebecca E. Billings to secure the payment of the sum of fourteen hundred dollars, which said mortgage was thus given on May 11, 1899, and duly filed for record, which said mortgage is still in force and unpaid. The plaintiff, by a reply, placed in issue all of the allegations of the answer by a general denial. The trial court, after hearing the evidence, made findings of fact, wherein it found that all of the allegations of the answer were true and proven, and that the plaintiff had no rights to or interest in said lands, and ordered the action dismissed. Judgment was entered pursuant to such findings of fact and conclusions of law. The plaintiff appeals from such judgment, and demands a trial de novo in this court.

On the trial in the district court the defendants offered in evidence a certified copy of the record of the mortgage given by the plaintiff, Margaret McCardia, and her husband, William McCardia, now deceased, upon the lands involved in this suit, being at the time the homestead of the said mortgagors. A stipulation was entered into between the attorneys that such certified copy might have the same force and effect as the original would be entitled to receive if offered in evidence. The plaintiff, however, objected to the introduction of such certified copy upon the ground that the same was incompetent, irrelevant, and immaterial, and under such objection it is specifically urged that the acknowledgment of such mortgage was not in compliance with the statute relating to acknowledgments, and did not,

therefore, entitle the same to be recorded. The acknowledgment of such a mortgage was in form as follows, to wit:

"Territory of Dakota,
County of Pembina. } ss.

"On this tenth day of October, in the year one thousand eight hundred and eighty-four, before me, John V. McIntire, a notary public in and for said county and territory, personally appeared William McCardia and Margaret McCardia, known to me to be the person who are described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

[Notarial Seal.] "JOHN V. McINTIRE,
"Notary Public, Dakota Territory."

It must be conceded that if the acknowledgment of the mortgage was so defective that it would not have entitled the mortgage to be recorded in the office of the register of deeds, then the certificate of the acknowledgment alone would not be any evidence of the execution of the mortgage. [378] There was no evidence in the case of the execution of the mortgage unless the same was furnished by the certificate of acknowledgment. It is also true that the certificate of acknowledgment must contain a substantial compliance with the statute pertaining to acknowledgments; that is, that the certificate must contain a statement of every fact that the statute prescribes shall be incorporated therein. If the statute prescribes a form for a certificate of acknowledgment, as it does in this state, the language prescribed for such certificate need not be followed; but the certificate will be held to be sufficient if the certificate used is the same in substance as that prescribed by the statute. It is also true, as a matter of law, that obvious errors or omissions, clearly appearing upon the face of the certificate to be clerical in their nature, will not invalidate the acknowledgment, and before the certificate will be held fatally deficient, there must be an absence of some essential fact of a substantial character. Before we enter upon a consideration of the certificate here involved, it may also be conceded that no presumptions or intendments will be indulged in favor of the certificate; on the contrary, it must affirmatively appear from the certificate itself that every fact necessary to be stated therein is stated therein in substance and effect. Courts, however, will construe the language of certificates of acknowledgment liberally, and hold them

valid if that can be done by a fair and reasonable construction of the language used.

Turning now to the acknowledgment of the mortgage in question, we find that it unequivocally appears that William McCardia and Margaret McCardia personally appeared before the notary. The words immediately following their names in the certificate, to wit, "known to me to be the person," considered in connection with the words "who are described in," show beyond question that the word "person" refers to William McCardia and Margaret McCardia. If it does not refer to these two grantors, then the verb "are" obviously would not have been used. The omission of the letter "s" from the word "person" was obviously a clerical omission. The pronoun "he" refers to the word "person" preceding it in the same sentence. It would render the whole sentence useless and meaningless, so far as Margaret McCardia is concerned, to place upon it the construction that she appeared before the notary, and acknowledged that her husband acknowledged the execution of the mortgage. Either that construction must be placed upon it, or we must hold that the word "he" was not changed to "they" through a clerical oversight. In Montgomery v. Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628, the word "the" in an acknowledgment should have read "they." With the word "the" in the certificate, it was not expressive of anything, and the court held that leaving off the "y" was a clerical error, and upheld the certificate as sufficient. To invalidate the certificate in this case would be a strained and technical construction of the language used, and a violation of the principle, well established, that substance shall control, and obvious errors be disregarded. [379] It follows, therefore, that the instrument was duly acknowledged by the plaintiff, and that such acknowledgmeint entitled it to be recorded in the register's office, and that the certified copy of the record of such mortgage in the register of deed's office was proof, prima facie at least, of the due execution of the mortgage under the stipulation as to the effect to be given to such certified copy entered into between the attorneys at the trial.

In her testimony the plaintiff denies that she ever signed or executed the mortgage in suit. Her execution of the mortgage purports to have been by making her mark, and to have been witnessed by three persons, none of whom—nor the notary—having been called as witnesses at the trial. So far as the defendants are concerned, proof of the execution of the mortgage rests upon the notary's certificate of her acknowledgment, con-

sidered in connection with her conduct in relation to the land involved since the year 1885. So far as respects plaintiff's evidence to the effect that she never executed the mortgage, it rests solely upon her own uncorroborated denial that she ever signed or executed it. Her testimony to the effect that she did not execute the mortgage is not convincing to our minds. When asked on cross-examination whether she had ever executed an instrument in the presence of the Purdys—who were subscribing witnesses to the execution of this mortgage, as indicated by the certified copy—she answered, "Not that I know of." To the question, "You have no recollection?" she answered, "I might have all right enough." Her conduct in reference to the land involved in this suit tends strongly to refute her contention that she did not execute the mortgage, and is strongly corroborative of the certificate of the notary that she executed and acknowledged the execution of the mortgage. She left this land and removed to Grafton in the spring of 1885. The land was then mortgaged, there being other mortgages thereon besides the one in suit which was being foreclosed in the latter part of 1885. Her explanation for the abandonment of the land by herself and husband is not satisfactory, and leads to the inference that they left the land on account of the encumbrances on the land. She has resided ever since at Grafton, not very far from the land, and has not paid any attention to it since. It does not appear that she has paid any attention to the land since, nor to the payment of taxes, interest, or the principal indebtedness. Her conduct tends to show an abandonment of the land and a knowledge of the foreclosure. A silence so long continued—nearly fifteen years—is not easily reconcilable with her contention now that the mortgage was forged. In view of these undisputed facts, we feel no hesitation in saying that she has entirely failed to overcome the probative force of the certificate of acknowledgment, conceding that such certificate raises only a prima facie presumption of its genuineness by that clear and convincing proof required in this class of cases. The general rule is that the certificate of acknowledgment will be held valid as against the unsupported evidence of the person certified to have executed it: Oliphant v. Liversidge, 142 Ill. 160, [880] 30 N. E. 334; 1 Am. & Eng. Ency. of Law, 2d ed., 560, and cases cited; Smith v. Allis, 52 Wis. 337, 9 N. W. 155. There are cases to be found adverse to this general rule, and it is true that it is difficult, if not impossible, to lay down an invariable rule in this class of cases, as much depends upon the weight to be

attached to the testimony of the grantor, considered in view of the facts and circumstances of each particular case.

The notice of sale under which the mortgage was foreclosed, and all papers subsequently executed by the sheriff in connection with such foreclosure, contained a mistake as to the date of the mortgage. The notice and other papers gave the date of the mortgage as October 1st, when it should have been given as October 10th. It is earnestly insisted that such mistake renders the foreclosure sale and all subsequent acts of the sheriff pertaining to the foreclosure void. The statute under which the foreclosure was made (Rev. Codes 1877, sec. 601) prescribes that the notice of sale must specify the date of the mortgage, and, among other things, the names of the mortgagor and mortgagee, the amount claimed to be due, and a description of the land. The notice in this case correctly gave the names of the mortgagors and mortgagees, the time, place, volume, and page where the mortgage was recorded, and a correct description of the land, together with the correct amount due. A similar question arose in the supreme court of Michigan in 1881: Reading v. Waterman, 46 Mich. 107, 8 N. W. 691. That court held the foreclosure valid, and used the following language: "We are therefore of opinion that none of the mistakes were substantial, or operated in any way to the prejudice of Waterman." That case was appealed to the supreme court of the United States, and is reported under the title of Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 9 Sup. Ct. Rep. 787. That court, after intimating that it would follow the decision of the Michigan court, as involving a construction of a state statute by the highest court of the state, although it might doubt the correctness of the decision as an original proposition, uses this language: "The reasoning of the Michigan supreme court, in our opinion, is sound, and its conclusion correct." In that case the defect in the notice differed from the defect in the case at bar, in this: In that case the date of the mortgage was stated once correctly and once incorrectly. But the identical question involved in this appeal came before the supreme court of Michigan again in Brown v. Burney, 87 N. W. 221. In this last case that court says: "The notice contained a correct date of the recording of the mortgage and the volume and page in which it was recorded. This error in setting out the date of the mortgage did not invalidate the notice. No one could be misled by it, as the mortgage was otherwise fully identified." In Morgan v. Joy, 121 Mo. 677, 26 S. W. 670, the notice of foreclosure correctly gave the

date of the mortgage, and the book and page where recorded, but failed to state the time of recording. The court says: "But, if the law be construed as meaning that the notice should give the date of the record, still a failure to state the date of the record, the [381] book and page of the record being stated, would not render the sale void." The precise question involved in this appeal came before the supreme court of Missouri in Baker v. Cunningham, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445. Regarding such omission, under a statute similar to this statute, prescribing what the notice shall specify, the court says: "The trial court properly held that the statement in the trustee's advertisement that the deed of trust was made in 1874, when in fact it was made in 1881, did not mislead the plaintiffs, or anyone else, and therefore it was immaterial. The immateriality in this error of date is made more manifest when it is remembered that the trustee's notice described the deed of trust as having been made by Alexander McCausland and Sarah E., his wife, and stated that it was recorded in book 'D,' at page 562, of the records of Johnson county." The supreme court of South Dakota, in commenting on the essentials of a notice of foreclosure on a matter not at all similar to the point here involved, says: "Evidently the object of the notice contemplated by statute is to fully advise all interested persons and the general public of the existence of conditions which authorize a foreclosure by advertisement; and, even though the words of the statute be not employed, its requirements are sufficiently complied with when such notice is reasonably certain and clear as to the names of the mortgagor and mortgagee, the amount claimed to be due thereon at the time of the notice, the time and place of sale, together with a description of the premises to be sold, which conforms substantially with that contained in the mortgage. Mere inaccuracies, not calculated to be misleading, are insufficient to invalidate a sale in the absence of a claim that anyone has been injured": Iowa Investment Co. v. Shepard, 8 S. Dak. 332, 66 N. W. 451. In Judd v. O'Brien, 21 N. Y. 186, the court says in the syllabus: "It is sufficient that the notice of foreclosure of a mortgage specify the place where the mortgage is recorded and the date. A mistake in the number of the mortgage book will not vitiate it if it could not have misled." The rule laid down in that case is that substantial compliance with the provisions of the statute is sufficient: See, also, Candee v. Burke, 1 Hun, 549. These authorities hold that a strict compliance with the statute regulating what a notice of foreclosure

by advertisement must contain is not necessary; that a substantial compliance is sufficient, and that the want of strict and literal compliance with the statute will not be fatal to the foreclosure in a case where no prejudice is shown or suggested. We hold that the statute is substantially complied with when the notice itself states facts correctly pertaining to the record, which record, if examined, would conclusively show the error in the notice. We are aware that the supreme court of Minnesota has, in a number of cases, held that a substantial compliance with the statute is not sufficient, and that it has recently held, in Clifford v. Tomlinson, 62 Minn. 195, 64 N. W. 381, that the remedy provided by the statute pertaining to foreclosures by advertisement must be "strictly and closely pursued." We deem the rule of substantial compliance sustained by the weight of authority more consonant with principles [382] of justice and less liable to work hardships. Some latitude and liberality in construction is fraught with no evil consequences when the substance of all requirements of the statute is present in the notice, and no claim of prejudice is made, or of having been misled. It is better, in our opinion, to adopt a construction giving practical effect to this statute, and to so construe it as to give some security to titles, when that can be done without doing violence to the intention of the legislature in enacting that law. The intention was to secure to the mortgagor and to those desiring to bid or to redeem from the sale sufficient information from which they could and can act. In cases of foreclosure by advertisement under a power of sale the power is created by the express contract and consent of the mortgagor. The statute only prescribes what shall be done to effectuate the terms and conditions of the power. The proceedings in such foreclosures are therefore based on the mortgagor's contract, and are largely for his benefit. Hence, no such strictness should be, or is, required in these foreclosures as in cases of proceedings by the state ex parte, and of a hostile nature, such as are taken in tax or other similar proceedings: Lee v. Clary, 38 Mich. 223.

The foreclosure sale in this case was made by the deputy sheriff, who issued the certificate of sale, and acknowledged the same before a notary. The acknowledgment was by the deputy sheriff, without any acknowledgment by the deputy on behalf of the sheriff. The certificate of sale was regularly executed in the name of the sheriff, by and through the deputy, but the name of the sheriff was not mentioned in the certificate of acknowledgment. At that time the statute did not prescribe any special

form nor requirements as to the manner of acknowledging instruments by deputy sheriffs. The proper way undoubtedly would have been for the deputy to have acknowledged the certificate for himself and also on behalf of his principal, the sheriff. The certificate, as acknowledged, was duly recorded. It is claimed that the failure to properly acknowledge the certificate rendered it inadmissible as evidence of its execution, or of any fact, and that it was void, and rendered the sale void, and that it passed no title. This court has held that the failure to file such certificate within the ten days fixed by the law during which it may be filed does not affect the sale nor the title of the purchaser, and that the statute regulating the time of filing such certificate is directory, and not mandatory: Johnson v. Day, 2 N. Dak. 259, 50 N. W. 701. We think the reasoning in that case is applicable to the facts in this case; that the failure of the officer to conform to the requirements of the statute should not be held to affect the sale in any way. However, without deciding the effect of such an acknowledgment, and conceding it to have been fatally defective, still the plaintiff could not prevail upon this last contention. There was an acknowledgment by the deputy, and the most that can be claimed against it is that it was fatally irregular in not making the acknowledgment on behalf of the sheriff as well as for himself. Section 3585 of the Revised Codes was passed after the acknowledgment in question [883] was taken. This law, passed in 1887, expressly cures and legalizes all defective acknowledgments of certificates of sale made by deputy sheriffs theretofore. By its very terms this section refers to all acknowledgments made by deputy sheriffs, "either by or for himself as such deputy, or in the name of or for his principal," and such provision clearly covers the alleged defect in the certificate in question, and gives to such certificates the same force and effect as though originally properly acknowledged. As to the power of the legislature to enact a general law curing and legalizing all acknowledgments, no question is made. We therefore hold that the certificate of sale was properly received in evidence.

This disposes of all the objections raised to the foreclosure. It follows that the judgment must be affirmed, and it is so ordered.

All concur.

Acknowledgment.—It is the policy of the law to uphold certificates of acknowledgment, and whenever substantial compliance

with the law is found, obvious clerical errors and all technical defects or omissions will be disregarded: Summer v. Mitchell, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562. A substantial compliance with all statutory requirements in taking an acknowledgment is necessary, though a literal and exact compliance is not required. The use of bad English does not invalidate a certificate: See the monographic note to Levingston v. Kittelle, 41 Am. Dec. 168, 175. On the conclusiveness of certificates of acknowledgment, see Hayes v. Southern Home etc. Assn., 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527; Council Bluffs Sav. Bank v. Smith, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270; monographic note to American Freehold etc. Co. v. Thornton, 54 Am. St. Rep. 150-159. A deputy may take an acknowledgment without mentioning his principal: Summer v. Mitchell, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562.

BERGMAN v. JONES.

[10 N. Dak. 520, 88 N. W. 284.]

MORTGAGE OF GOODS ALLOWING SALES—WHEN VALID.—A chattel mortgage on a stock of merchandise, allowing the mortgagor to remain in possession and sell the goods, is valid, if the sales are for the benefit of the mortgagee. (p. 744.)

MORTGAGE OF GOODS ALLOWING SALES—WHEN VOID.—A chattel mortgage on a stock of merchandise, allowing the mortgagor to remain in possession and sell the goods, is void as to his creditors, if its effect is to hinder and delay them, and to protect the mortgagor in the further prosecution of his business, rather than secure the mortgage debt. (pp. 744, 746.)

FRAUD A QUESTION FOR COURT.—If the evidence of fraudulent intent is contained in a written instrument, it is the duty of the court to declare its legal effect. (p. 747.)

A CHATTEL MORTGAGE BY AN INSOLVENT PARTNERSHIP to secure the debts of its members, which it is under no obligation to pay, is void as to creditors. (p. 748.)

W. E. Purcell and C. L. Bradley, for the appellant.

McCumber, Bogart & Forbes, and Fred B. Dodge, for the respondent.

523 YOUNG, J. The plaintiffs seek in this action to recover damages from the defendant, as sheriff of Richland county, for the alleged conversion by him of a stock of general merchandise upon which the plaintiffs claim to have had a mortgage. Their damages are laid at the sum of two thousand nine hundred and sixty-six dollars and eighty-one cents, with interest thereon from the date of the alleged conversion. The facts and proceedings which are essential to a determination of the questions pre-

sented on this appeal may be stated as follows: The property in controversy, at and prior to its seizure by this defendant, was owned by a copartnership, composed of August Bergman and Henry Maack, who were then engaged in the general mercantile business in the village of Lidgerwood, in said county, under the firm name of Bergman & Maack. The chattel mortgage upon which plaintiff's rights in this action are based was executed by said copartnership on December 16, 1898, and filed in the office of the register of deeds of said county, on December 19, 1898, and covered the property in question. On December 22, 1898, the defendant sheriff seized said property under a warrant of attachment in an action pending in the district court of Richland county, wherein Wyman, Partridge & Co. was plaintiff and said copartnership was defendant, upon a debt due from said copartnership amounting to thirteen hundred and sixty-seven dollars and forty-six cents, for goods sold and delivered to it by said attaching creditor. On December 29, 1898, the plaintiffs caused a demand to be made upon the defendant for the property covered by their mortgage, and the same was refused. On January, 3, 1899, bankruptcy proceedings were instituted in the United States district court for the district of North Dakota against said copartnership, and on the fourth day of January, 1899, a warrant issued out of said court under which the marshal of said court took from the possession of the defendant all of the goods theretofore seized by him as above stated. On January 23, 1899, said firm of Bergman and Maack was adjudged bankrupt, and on February 3, 1899, a trustee was appointed to administer the trust estate; and said trustee, as such, received from the United [524] States marshal the goods in question, for the purpose of administration under the authority of the bankruptcy court.

The mortgage upon which plaintiffs base their right of recovery is as follows: "Know all men by these presents, that August Bergman and Henry M. Maack, copartners doing business under the firm name and style of Bergman & Maack, at Lidgerwood, Richland county, North Dakota, parties of the first part, being justly indebted to Herman Bergman and Fred D. Maack, parties of the second part, in the sum of two thousand nine hundred and sixty-six and eighty-one one-hundredths dollars, which debt is hereby confessed and acknowledged, have for the purpose of securing the payment of said debt, bargained, granted, sold, and mortgaged, and by these presents do bargain, sell, and mortgage, unto the said second parties, their heirs and assigns, all the

personal property described as follows, to wit: All that certain stock of merchandise, consisting of drygoods, boots, shoes, hats, caps, clothing, notions, glassware, crockery, woodenware, and all other articles of merchandise, now contained in the two-story store building owned by Ralph Maxwell and leased to the said first parties, and situated upon lot No. two (2) of block No. 11 of the village of Lidgerwood, in said county of Richland and state of North Dakota, to the said second parties, their heirs and assigns, forever. Provided, however, that these premises are upon this express condition: That if the said first parties shall pay, or cause to be paid, unto the said second parties, or their heirs or assigns, the said sum of two thousand nine hundred and sixty-six and eighty-one one-hundredths dollars, according to the conditions of two certain promissory notes of even date herewith, as follows, to wit: One note for the sum of eleven hundred and forty-eight and fifty-nine one-hundredths dollars, due and payable on the first day of November, 1899, to the order of Fred D. Maack, one of the second parties, and one note for the sum of eighteen hundred and eighteen and twenty-two one-hundredths dollars, due and payable on the first day of November, 1899, to the order of Herman Bergman, one of the said second parties—and interest thereon at the rate of eight per cent per annum, then these presents to be null and void; otherwise to remain in full force and effect. And the said first parties hereby covenant and agree to and with the said second parties as follows, to wit: 1. That they will take good and proper care of the said goods, wares, and merchandise above described, and will keep and maintain the said goods, and all thereof, at the said building wherein they are now situated, as above described, and that they will keep the said stock of goods, wares, and merchandise at its present value by replenishing all goods sold therefrom, as hereinafter provided. 2. That they will sell the said goods, wares, and merchandise in the usual course of trade, for cash only, and will keep an accurate and correct account of all goods so sold, which said account shall be open to the inspection of the said second parties, their assigns or agents. 3. [525] That they will replenish all goods, wares, and merchandise so sold from said stock from time to time, and pay for same cash at time of purchasing same, and will not buy goods on credit to replenish said goods, wares, and merchandise so sold and delivered. 4. That they will pay the expense of selling said goods, wares, and merchandise out of the proceeds of said sales—such expenses to consist only of freight on goods bought to replenish said stock,

rent for said building, fuel and light for same, taxes and insurance upon said goods, and the further sum of thirty dollars per month for each of the said first parties for living expenses—and will render an account of the same to the said first parties on the first day of each and every month during the time that these presents shall remain in force and effect. 5. That on the first day of every month during the time that these presents shall remain in force and effect they will render to the said second parties a full, true, and correct statement of the sales from said stock of goods, wares, and merchandise, and the receipts therefrom, together with the amounts expended in replenishing the goods, wares, and merchandise so sold, and the expenses of conducting the said business, and will pay to the said second parties each month the excess of the receipts over and above the amounts so paid for replenishing the said goods, wares, and merchandise and the expenses of conducting the said business; the same to be applied upon the said indebtedness until the whole thereof shall have been paid in full, together with the interest thereon." Then follows the usual power of sale for default in the condition of the mortgage.

The above chattel mortgage and the notes therein described were signed by both members of the copartnership. The notes secured did not represent partnership debts, but represented individual debts of the partners to the payees in said notes, which debts were of at least a year's standing. The note to Herman Bergman represented an amount owed to him by his son, August Bergman, and the note to Fred D. Maack covered an amount due him from his brother Henry M. Maack. Both of the mortgagees resided at Norwood, Minnesota. The mortgage in question was given under the following circumstances: Early in December, 1898, Henry Maack went to Norwood and conferred with his brother and Herman Bergman in reference to giving security for their private debts to plaintiffs upon this stock of merchandise. Henry Maack then "partly agreed to give the mortgage on their stock of goods at Lidgerwood," and on his return he was "to submit the matter of security to August Bergman." The entire matter as to the form and contents of the mortgage was left to the mortgagors, and it was expected that the mortgagors would run the business the same way as before, and that they would use such an amount of the proceeds of sales as they would need to support their families and to purchase new goods. Upon his return the two partners went to an attorney in Lidgerwood, and under their directions he drew the

mortgage and notes [526] in question, and the mortgage was then executed and filed, as before stated. The mortgagees were not aware that the mortgage had been executed until the attorney who drew it informed them of the attachment of the goods.

The case was tried to a jury. At the close of the testimony, counsel for defendant moved for a directed verdict for defendant, upon the ground that it conclusively appeared from the evidence: 1. That the mortgage under which plaintiffs claim a right or interest in the property attached was fraudulent and void as to the creditors of the mortgagors; 2. That both the lien of the attachment and plaintiff's mortgage was destroyed by the bankruptcy proceedings, and that the title to the property in question had vested in the trustee in such bankruptcy proceedings. This motion was denied. But the court, upon its own motion, being of opinion that plaintiffs were entitled to recover, but that they had sustained only nominal damages, instructed the jury to return a verdict for plaintiffs for one dollar. Thereafter the court made an order for judgment on the verdict, and for costs and disbursements in favor of the plaintiffs. Later, upon motion of defendant, the judgment was modified by depriving plaintiffs of their costs, and awarding costs to defendant. Plaintiffs have appealed to this court, and, in a statement of case duly settled, specify for review a number of alleged errors.

The first and most important error assigned relates to the direction of the verdict. Appellants claim that "the court erred: 1. In directing a verdict in this case for the plaintiffs for the sum of one dollar; and 2. In not directing a verdict for plaintiffs for the amount claimed in the complaint." We are of opinion that the trial court did not err in the particulars complained of to plaintiffs' prejudice. It is apparent that the foundation of plaintiffs' right to recover any sum whatever in this action is the chattel mortgage. If for any reason it appears that the instrument is invalid, their entire cause of action fails. The defendant's motion for a directed verdict assailed the mortgage as being fraudulent and void as to creditors of the mortgagors, and also upon the ground that the lien thereof had been stricken down by the bankruptcy proceedings. We shall have occasion to consider only the first ground of the motion—namely, the question as to whether the mortgage was fraudulent and void as to the creditors of the partnership. Counsel for appellants assert that the validity of the mortgage is sustained by the principles laid down by this court in Red River etc. Bank v. Barnes,

8 N. Dak. 432, 79 N. W. 880. We have reached an opposite conclusion. The views of this court as to the test to be applied to chattel mortgages of merchandise, like that now under consideration, were expressed in the following extract from the opinion formulated by Wallin, J., in the case referred to: "There is much conflict of judicial opinion as to the effect of permitting a debtor who has given a mortgage upon a stock of merchandise to remain [527] in possession and sell out the same. But we think it must be conceded that the better authorities do not hold that such an arrangement is necessarily fraudulent. Each case should be disposed of upon its own facts. We concede, however, that there is substantial agreement in the cases to the effect that such an arrangement may be assailed by creditors where it appears that the same was primarily intended as a means of hindering and delaying creditors, and at the same time of allowing the debtor to continue his business for his own advantage. In such cases the crucial test seems to be whether the arrangement is honestly entered into as a means of enabling the creditor to realize the largest amount possible out of the property mortgaged, or whether, on the contrary, the arrangement is made as a mere shift or device entered into chiefly for the debtor's advantage, and whereby he is enabled to carry on the business without interference from other creditors, and for his own advantage. We quote in this connection the language used by Mr. Justice Brewer in commenting upon certain decisions bearing upon this question, including Robinson v. Elliott, 22 Wall. 520. The distinguished jurist said: 'In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that, either in the mortgage, or by parol agreement between the parties, the mortgagor is to retain possession, with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors.' We have quoted this language from the printed argument of counsel for the defendant, and we fully indorse the same as embodying a clear and satisfactory expression of the rule rec-

ognized by the better authorities as applicable to cases such as the case at bar": See cases cited in the opinion.

Turning, now, to the mortgage in question, we find that it conclusively appears, from the provisions therein contained, that its primary purpose and necessary effect was to hinder and delay the creditors of the mortgagors, and to serve as a shield and cover for the partnership property; or, in other words, it operated not as security for the debt due the mortgagees, but as a protection to the mortgagors in the further prosecution of their business, and was thus primarily for the benefit of the mortgagors. By referring to its condition, it will be seen that no change whatever in the conduct of the business was contemplated. On the contrary, it was to continue just as it had been formerly conducted. The stock was to be kept up to the same actual value as when the mortgage was given, by additions thereto made from the proceeds of sales of the mortgaged [528] goods. The reservation by the mortgagors of the power to sell the mortgaged goods and to purchase new goods with the proceeds, when considered in connection with the provision that the stock was to be kept up to its original value, can be construed only as an express authorization by the mortgagees to the mortgagors to continue the business for an indefinite period. The selection of the additions to be made to the stock was not subject to the control of the mortgagees, but was controlled entirely by the mortgagors; and it was not contemplated that such additions were to be for the purpose of sorting up the mortgaged goods, thus facilitating their sale and aiding in paying the mortgage debt, but they were primarily for the purpose of aiding the mortgagors to keep such a stock of goods as would be profitable for them to have in the future conduct of their business. So, also, the provision for payment of the expenses of conducting the business out of the proceeds of sales of the mortgaged property, when considered in connection with certain other provisions of the mortgage, is equally fatal to its validity.

Under the terms of the mortgage, the business was to continue just as it was before the mortgage was given. The only new obligation resting upon the mortgagors was their promises to pay on the mortgage debt the net profits of the business monthly; and this was in reality no more than an assurance, for the mortgagors, and not the mortgagees, controlled the proceeds of sales. In the meantime the mortgagors reserved the continuing right to pay all of the expenses of conducting the business, including rent, heat, light, taxes, insurance, freight on new

goods, and thirty dollars per month for each of the partners, out of the proceeds of sales of the mortgaged property. The right to withhold these expenses was limited only by the life of the mortgage. It will be observed, by referring to the mortgage, that it does not cover additions to the stock or after-acquired property. Consequently, the new goods would not be subject to the mortgage lien. The necessary effect, then, of the provision authorizing the mortgagors to sell the mortgaged goods and use the funds derived from such sales to purchase other goods, was to furnish a sure means to the partnership of acquiring an unencumbered stock of goods by aid of the property which was ostensibly hypothecated to secure the payment of the mortgage debt. Under such circumstances, it is apparent that the sales authorized to be made by the provision referred to were for the benefit of the mortgagors.

Again, the fact that the mortgaging did not cover new goods rendered the provision for payment of expenses for conducting the business out of the proceeds of sales of the mortgaged goods fatal to the validity of the mortgage. As we have seen, should the business be conducted according to the terms of the mortgage, the items of stock would shift by sales and repurchases until no portion of the mortgaged goods would remain. Through the process of evolution provided for by the mortgage, the mortgaged stock might in time become an unencumbered [529] stock in the hands of the mortgagors without the payment of a single dollar upon the mortgage debt. Not only does the mortgage afford authority to dispose of the mortgaged property without paying the proceeds upon the debt ostensibly secured, but it expressly authorizes the use of the proceeds of sales of the mortgaged goods to pay the entire expenses of running a business in which the mortgagees have but a partial interest. It might be conceded that on the day the mortgage was given the expenses provided for were legitimate charges, but as new goods were purchased, and the amount of unencumbered property increased, upon which the mortgagees had no lien, it is clear that the payment of all of the expenses of conducting this business was merely an application of the mortgaged property for the benefit of the mortgagors—in other words, was the payment of all the expenses of a business in which the mortgagees had but a partial and constantly diminishing interest.

The mortgage involved in Red River etc. Bank v. Barnes, 8 N. Dak. 432, 79 N. W. 880, was unlike the mortgage now under consideration, in all of its controlling features. The mortgage

in that case covered after-acquired property. The mortgagor was left in possession as the agent of the mortgagee. The proceeds of sales were to be deposited daily. The new goods were purchased only in small quantities, and as a means of keeping an assortment, and to keep the stock in such condition as to make it profitable to handle, and with a view to the disposition of the entire stock of merchandise in the store. And the purchases in that case were determined by the mortgagee. In that case we reach the conclusion that the arrangement was an honest one, and calculated to afford at least as large a sum to apply upon the mortgage debt as could be realized from the goods at a forced sale. In the mortgage under consideration the restrictions found in the mortgage just referred to are entirely wanting. The necessary effect of this mortgage was to hinder and delay the creditors of the copartnership. No other conclusion is possible. We have not overlooked the fact that under section 5055 of the Revised Codes of 1899, the question of fraudulent intent is made a question of fact, and not of law. Here, however, the evidence of such intent is contained in a written instrument, and we cannot avoid the responsibility of declaring its legal effect. Our duty to do so is clear. On this subject we quote from Wait on Fraudulent Conveyances, section 354: "Where the evidence is of such a conclusive nature that the fraudulent intent unmistakably fastens its fangs upon the transfer, so that a verdict or finding contrary to the evident evil design so established would be erroneous, the court pronounces the transaction covinous, and imputes the fraudulent intent to the parties, in obedience to the principle of law that they must have contemplated the natural and necessary consequences of their acts. Where the facts are not controverted, and do not admit of a construction consistent with innocence, surely [530] the burden is cast upon the court to declare the result. There is no question of intention to be submitted to the jury. As the mortgage shows upon its face that it was not designed by the parties as an operative instrument between them, its only effect is to prejudice others. The court should 'pronounce it void, for the reason that the evidence conclusively shows it fraudulent': Russell v. Winne, 37 N. Y. 595, 97 Am. Dec. 755. It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they constitute the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit

a debtor to say that he used them for an honest purpose in any case: Coolidge v. Melvin, 42 N. H. 520; Winkley v. Hill, 9 N. H. 31. In Blakeslee v. Rossman, 43 Wis. 124, Chief Justice Ryan said: 'Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, bona fide or mala fide, is immaterial to an instrument per se fraudulent and void in law. The fraud which the law imputes to it is conclusive. Fraud in fact imputed to a contract (valid on its face) is a question of evidence'": See, also, Newell v. Wagness, 1 N. Dak. 69, 44 N. W. 1014.

The mortgage in question is void as to creditors for another reason. When the mortgage was given the partnership was insolvent. The mortgage covered practically all, if not all, of the partnership property, and it undertook to secure the individual debts of the partners, which debts the partnership was under no legal or moral obligation to pay. In short, it was an attempted gift by an insolvent partnership of all of its property. This cannot be done. There is entire harmony in the authorities on on this point. "A partnership paying the private debt of one of its members is paying what it is not liable for in law, equity, or morals, and is, in effect, giving away its property; and such conveyance, no bona fide rights intervening, is fraudulent and void as to existing creditors if they are prejudiced thereby, as well as to the separate creditor of the other partner, whose individual interest in the firm is thus given away": 1 Bates on Partnership, sec. 566. See, also, Ransom v. Van Deventer, 41 Barb. 307; Kieth v. Fink, 47 Ill. 272; Heineman v. Hart, 55 Mich. 64, 20 N. W. 792; Cron v. Cron, 56 Mich. 8, 22 N. W. 94; Wilson v. Robertson, 21 N. Y. 587; Ferson v. Monroe, 21 N. H. 562; Patterson v. Seaton, 70 Iowa, 689, 28 N. W. 598; Menagh v. Whitwell, 52 N. Y. 147, 11 Am. Dec. 683; Keith v. Armstrong, 65 Wis. 225, 26 N. W. 445.

Having reached the conclusion that the mortgage was fraudulent and void as to creditors, it follows that plaintiffs had no cause of action. The court therefore properly refused to direct a verdict for plaintiffs for the full amount of their claim. Error was committed, however, in awarding to plaintiff nominal damages, and the inclusion of the sum of one dollar in the judgment appealed from was [531] erroneous. Otherwise the judgment, including the allowance of costs to defendant, meets our approval. The district court is directed to modify its judgment by eliminating the sum allowed to plaintiffs as nominal damages, and as so modified the judgment will be affirmed, with costs to respondent.

The view we have taken as to the mortgage renders a consideration of other errors assigned unnecessary.

All concur.

A Chattel Mortgage with the Right to Sell the goods mortgaged in the ordinary and usual course of trade is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and that the mortgagor is to account to him for the proceeds: Noyes v. Ross, 23 Mont. 425, 75 Am. St. Rep. 543, 59 Pac. 367. See, too, Cox v. Birmingham Dry Goods Co., 125 Ala. 320, 82 Am. St. Rep. 238, 28 South. 456; Francisco v. Ryan, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045. Such mortgages, however, have frequently been held invalid as to creditors: Eckman v. Munnerlyn, 32 Fla. 367, 87 Am. St. Rep. 109, 13 South. 922; Pabst Brew. Co. v. Butchart, 67 Minn. 191, 64 Am. St. Rep. 408, 69 N. W. 809; Birmingham Dry Goods Co. v. Roden, 110 Ala. 511, 55 Am. St. Rep. 85, 18 South. 135. See the discussion of this question in the monographic note to Peabody v. Landon, 15 Am. St. Rep. 912-917.

The Rights of Partnership Creditors as against the creditors of the individual partners is considered in Kincaid v. National Wall-Paper Co., 63 Kan. 288, ante, p. 243, and cases cited in the cross-reference note thereto, 65 Pac. 247.

CLOPTON v. CLOPTON.

[10 N. Dak. 569, 88 N. W. 562.]

MOTIONS.—THE REMEDY BY APPEAL AND THAT BY MOTION to vacate an order are alternative. (p. 753.)

THE DOCTRINE OF RES JUDICATA IS NOT APPLIED TO ORDERS with the same strictness as to judgments. (p. 753.)

A NEW MOTION FOR THE SAME RELIEF IS A MATTER OF RIGHT and may be made without leave of court, when made upon a new state of facts. (p. 753.)

THE HEARING OF A NEW MOTION IS DISCRETIONARY with the court, and leave must first be obtained, when made upon the same state of facts as those presented on a previous motion. (p. 753.)

THE FACT OF HEARING A MOTION A SECOND TIME IS PROOF that the court has given leave to present the matter anew. (p. 754.)

DIVORCE—SECOND MOTION ON SAME QUESTION.—The hearing of an order to show cause why a decree of divorce should not be vacated is not a bar to a motion, supported by additional evidence, to show cause why the vacating order should not be set aside, though the same ultimate question is presented at both hearings. (pp. 750, 754.)

E. C. Rice and Cochrane & Corliss, for the appellant.

Newman, Spaulding & Stambaugh, for the respondent.

[570] WALLIN, C. J. The facts presented by the record in this case are as follows: On the eighteenth day of January, 1899, a complaint was filed by the plaintiff in the district court of Morton county, alleging a cause of action against the defendant for a divorce from the bonds of matrimony upon the ground of cruel and inhuman treatment. Later, and on the twenty-sixth day of the same month, one James E. Campbell, a practicing attorney residing in said county of Morton, filed in said action a paper purporting to be the answer of the defendant to the plaintiff's complaint, which answer admitted that the plaintiff was a resident of this state, and denied the allegations of cruel and inhuman treatment, as alleged in the complaint. On the second day of February, 1899, the said James E. Campbell and the plaintiff's attorney appeared in open court, and stipulated that the court should appoint a certain person named by them as referee to take the testimony in the action, and report the same to the court; whereupon the district court by its order appointed the referee agreed upon, and upon the same day referee filed his report, which included the testimony of the [571] plaintiff, and whereby it appeared that the defendant offered no testimony before said referee. Later, and upon the same day, findings were filed by the court, and a judgment was entered in the action in favor of the plaintiff, whereby the parties were divorced from the bonds of matrimony. It further appears that the defendant on the twenty-third day of July, 1900, appeared by one of her present attorneys, E. C. Rice, Esq., and applied for and obtained an order from said district court requiring the plaintiff to show cause on the twenty-fifth day of August, 1900, why said judgment of divorce should not be vacated and set aside, upon the ground that said James E. Campbell, who prepared and served the answer to the complaint, did so without authority from the defendant. The final hearing upon the order to show cause occurred on the thirtieth day of November, 1900, at which hearing the parties were represented, respectively, by their attorneys, and affidavits and counter-affidavits were submitted upon the issue of fact raised by the order to show cause, viz., whether the said James E. Campbell was or was not authorized to appear and file an answer in the action in behalf of the defendant. After hearing counsel and considering the evidence submitted upon the motion, the district court entered an order dated November 30, 1900, which embraced the following language: "The court finds that the defendant never, directly or indirectly, authorized the employ-

ment of James E. Campbell to enter an appearance in this action on her behalf. The court also expresses it as its belief, from the evidence and from the statements of counsel, that Mr. Campbell acted in good faith, believing that he had authority to appear; whereupon the decree and judgment entered in the above-entitled action is set aside, and the defendant is given thirty days in which to file an answer, and the case to stand for final disposition the same as if no judgment or decree had heretofore been entered." It further appears that the plaintiff, on the twenty-second day of January, 1901, applied for and obtained from said district court an order requiring the defendant to show cause before that court on the twenty-fifth day of January, 1901, why the above-quoted order vacating the decree of divorce should not be set aside and annulled on the ground that the same was procured by deceit and fraud practiced upon the court. The last-mentioned order to show cause came on to be heard in the district court on the thirtieth day of January, 1901, and at said hearing both parties were represented by counsel, and affidavits were submitted on both sides upon the issues presented by the order to show cause; whereupon said court, after hearing counsel and considering the proofs submitted at such hearing, entered an order in the action, which, so far as material, declares that the order of November 30, 1900, "was procured by and through the fraud and deceit practiced by the defendant upon the court, and that said order was improvidently made." Said order further recited that said James E. Campbell was defendant's attorney in the action, and did, when the answer was filed, have authority to file [572] an answer in defendant's behalf. Said order further directed that the vacating order of November 30, 1900, be set aside and annulled, and that the judgment of divorce entered on the second day of February, 1899, "remain and be in full force and effect as if said order of November 30, 1900, had not been made." From the order dated January 30, 1901, setting aside the former order and reinstating the judgment, the defendant has appealed to this court.

In this court it is contended by counsel for the appellant that the order appealed from must be reversed, for the reason that the district court, under established principles of law and practice, was devoid of lawful authority to make the order, and this for the reason, as counsel argue, that the questions involved and decided by the order appealed from had been previously fully adjudicated by the district court upon the order

to show cause obtained by the defendant, and which culminated in the order of November 30th vacating the judgment. In support of this proposition, the appellant's counsel argue that the ultimate question presented to the district court for solution by the two orders to show cause was identical, viz., one of jurisdiction in the district court over the person of the defendant, and that the pivotal fact to be determined upon both applications to the court below was whether the attorney who assumed to represent the defendant in the action, and who filed an answer to the complaint in her behalf had or had not authority to do so; and, upon the assumption that these premises are made manifest by the record, counsel proceed to the conclusion that the question of jurisdiction is res judicata, and, therefore, cannot be relitigated upon the last order to show cause (that obtained by the plaintiff), for the reason that it was fully adjudicated upon the order previously obtained by the defendant. But we think this postulate of counsel is fairly debatable. From our standpoint the record develops many dissimilar features in the two applications for relief to the district court. Upon the first order to show cause the defendant attacked a final judgment entered in the district court, and did so solely upon jurisdictional grounds. Upon the second order (that obtained by the plaintiff), an interlocutory application was made to the district court to set aside an order in the action, which order plaintiff claimed was obtained by means of false testimony and a deceit practiced upon the court by the defendant. We are far from being convinced that these dissimilar features do not distinguish the two applications in such a way as to wholly differentiate them from each other; but for the purposes of the case it will not, from our point of view, become necessary to determine this question.

In deciding the case we shall accept the premise of the appellant's counsel, and concede that the ultimate question presented by the last order to show cause was the same as that presented by the first, viz., a question of jurisdiction. But in disposing of the case it must be further premised that additional evidence of a convincing character [573] was presented upon the hearing of the last order, which evidence was discovered by the plaintiff after the first order had been made and the judgment had been vacated. We are, therefore, confronted with a case where a second motion is made in the district court upon the same grounds and state of facts, and to obtain the same ultimate relief, sought by a prior motion, which had been

decided; the only difference in the two motions being that the one last made was supported by additional evidence. The law question presented is whether this practice can be permitted. It is contended that, inasmuch as the order which vacated the judgment was an appealable order, the plaintiff was limited to that mode of reviewing the action of the district court. Upon this question there is some conflict of judicial opinion, but it seems that the weight of authority is arrayed in support of the proposition that the remedy of appeal and that by motion to vacate an order are alternative remedies: See Belmont v. Erie Ry. Co., 52 Barb. 637; Aiken v. Peck, 72 Ga. 434; 15 Ency. of Pl. & Pr. 356; also, 14 Ency. of Pl. & Pr. 87.

It is further contended that the question decided upon the first order to show cause—i. e., that of jurisdiction—is res judicata, and hence the same question could not lawfully be relitigated in the trial court upon the hearing of the second order to show cause. Here again there is presented a conflict in the adjudications, but it seems that the weight of authority, as well as the better opinion, is that a court of superior jurisdiction, unless restricted by statute, has such control of its own orders that it may vacate or modify the same in furtherance of justice, and also determine the conditions upon which they shall be operative. Nor is the doctrine of res judicata applied to orders with the same strictness as to judgments: See 15 Ency. of Pl. & Pr. 349; Johnston v. Brown, 115 Cal. 694, 47 Pac. 686; Bowers v. Cherokee Bob, 46 Cal. 280, 281; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; 14 Ency. of Pl. & Pr. 176; Page v. Page, 77 Cal. 83, 19 Pac. 183.

It has been said that what may be done by motion may be undone by motion: See Belmont v. Erie Ry. Co., 52 Barb. 637; White v. Munroe, 33 Barb. 651. The rule in New York, which we think is the better rule, is well settled that a new motion for the same relief is a matter of right, and may be made without leave of court, when the motion is made upon a new state of facts; but, on the other hand, where a new motion is made upon the same state of facts as those presented on a previous motion, that the hearing of such new motion is discretionary with the court, and leave must be obtained to hear the same. The rule that leave must be first obtained before or at the second hearing is the established rule in Minnesota: See Carlson v. Carlson, 49 Minn. 555, 52 N. W. 214.

In the case at bar no objection appears to have been made by the defendant to the second hearing in the district court,

nor do we think that such objection, if made, would properly have been sustained. [574] Before the second application was heard upon its merits the district court, upon proper application therefor, had by its order to show cause directed that the application should be heard before the court at a time and place specified in its order. We think this order was tantamount to an express leave of court to present the matter a second time to the court. But, independently of this view, it appears to be the better opinion that the fact of hearing the same matter a second time furnishes irrefragable proof that the court, either before or at the hearing, had given leave to present the matter anew: Harris v. Brown, 93 N. Y. 390. See Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; also 14 Ency. of Pl. & Pr. 186. The rule requiring previous leave is one of mere practice, and may be relaxed: 14 Ency. of Pl. & Pr. 186. But it should be kept in mind that the rule allowing a second hearing of a motion upon the same state of facts which was presented at a former hearing rests in the discretion of the court, and is not a strict legal right. This rule of practice requiring leave to be granted is most salutary, and one intended to prevent the abuse which would likely ensue if litigous persons were permitted, uncurbed, to make repeated motions to the same court, based upon the same state of facts. Our conclusion is that no rule of law or practice was violated by the district court in permitting the plaintiff to move in that court to vacate the previous order obtained by the defendant, and this brings us to the merits of the order appealed from.

We are required to examine the evidence submitted at the hearing of plaintiff's order to show cause, and to determine therefrom whether the order appealed from is sustained by the evidence. This feature of the record presents no difficulties. This court, after a careful consideration of all the evidence in the record, is unanimously of the opinion that the order appealed from is sustained by an overwhelming weight of evidence. But as the evidence is voluminous, we are convinced that an attempt to analyze the same, and present it in logical order, would serve no useful purpose, and hence we shall refrain from any attempt to do so. Nor shall we, upon this appeal from an order, consider whether or not the plaintiff was, when the decree was entered, a bona fide resident of this state within the meaning of the divorce law. That question was not litigated upon the hearing had below, which culminated in the order appealed from. Moreover, the defendant, by her first

answer (which we hold was filed by her authority and in accordance with her then existing desires, and pursuant to a definite arrangement made with her husband), affirmatively admitted the plaintiff's residence in this state. It is true, and this court has so ruled, that in a divorce case an admission of residence made by answer does not preclude the trial court from intervening in behalf of the state to investigate and determine the matter of the residence of the plaintiff, notwithstanding the admission in the answer: See Smith v. Smith, 8 N. Dak. 219, 86 N. W. 721. But in the case under [575] consideration the record does not show that the trial court intervened for this purpose. Upon this state of facts it must follow that the question of the plaintiff's residence, as against the defendant at least, is foreclosed by defendant's express admission of plaintiff's residence in her original answer to the complaint.

We find no error in the order appealed from, and hence the same will be affirmed.

All the judges concurring.

An Order of Court on a Motion or summary application is not technically res judicata, but the same matter will not be twice heard without good cause shown: Chichester v. Cande, 3 Cow. 39, 15 Am. Dec. 238; Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 594. But see Burner v. Hevener, 34 W. Va. 774, 26 Am. St. Rep. 948, 12 S. E. 861. A motion once denied cannot be renewed without leave of court, so long as the facts continue the same. Though where new facts have arisen, the motion may be renewed as a matter of right: Dolifus v. Frosch, 5 Hill, 493, 40 Am. Dec. 368, and note.

NESS v. JONES.

[10 N. Dak. 587, 88 N. W. 706.]

APPEAL—MOTION FOR NEW TRIAL.—IT IS OPTIONAL with the moving party in jury cases to move or not to move for a new trial in the district court; but if the motion is not made below, no review of questions of fact can be had in the supreme court. (p. 757.)

EXEMPTIONS—HEAD OF FAMILY.—THE HUSBAND, not the wife, is primarily the head of the family. (p. 761.)

EXEMPTIONS.—THE LAW TOLERATES BUT ONE HEAD and one exemption for one family. (p. 762.)

EXEMPTIONS—HEAD OF FAMILY.—A WIFE cannot, on the mere fact of her marital relation, base a claim of exemption.

But she may assert such claim when conditions cast upon her the rights and responsibilities appertaining to the headship of a family. (pp. 760, 763.)

EXEMPTIONS—HUSBAND AS HEAD OF FAMILY.—IF A WIFE, with slight assistance from her husband, carries on their home farm, and supplies the necessaries for the family, while he engages in business, and is not disabled or unwilling to labor to support the family, he is the head of the family, within the exemption laws, as to the crops. (pp. 761, 763.)

W. E. Purcell and C. L. Bradley, for the appellant.

H. C. Preston and McCumber, Bogart & Forbes, for the respondent.

588 WALLIN, C. J. This action was brought to recover the possession of personal property of the admitted value of eight hundred and fifty dollars, which the defendant, as sheriff, seized on an execution issued upon a judgment against the plaintiff and her husband as joint debtors. The plaintiff, before instituting suit, demanded the property from the sheriff as exempt property. At the close of the trial the court directed a verdict for the defendant, and upon the return of such verdict judgment was entered in favor of the defendant. A statement of the case was settled in the court below, but no motion to vacate the verdict or for a new trial was made in the trial court.

Counsel for appellant have assigned numerous errors upon the record, the last and most important of which is as follows: "The court erred in granting the motion to direct a verdict for the defendant." At the threshold of the case we are met by an objection urged by counsel for the respondent to any consideration of this assignment of error. As a basis for the objection counsel assume that the assignment requires the consideration of questions of fact, and upon this assumption counsel claim that this court cannot lawfully proceed to review the so-called questions of fact, for the reason that the appellant has omitted to move for a new trial in the district court. In support of this objection counsel for respondent have cited numerous cases from other states, none of which, in our judgment are in point. The objection is untenable in this jurisdiction. The trouble with it lies in the assumption that the assignment of error involves a review of questions of fact. The assignment has reference to a ruling of the trial court made during the trial of the action, and, if such ruling was erroneous, it was an "error of law occurring at the trial," and would fall under subdivision 7 of section 5472, relating to new trials.

Such rulings were classed as "errors of law" in the supreme court of the territory of Dakota, in which the rule in California was followed, and such has been the unvarying practice in this state: See De Lendrecie v. Peck, 1 N. Dak. 422, 424, 48 N. W. 342; Slattery v. Donnelly, 1 N. Dak. 266, 47 N. W. 375; Henry v. Maher, 6 N. Dak. 413, 414, 71 N. W. 127; Hayne on New Trial and Appeal, secs. 112, 114.

589 But this rule of practice, which was a mooted one in the courts, was conclusively settled by the enactment of a statute now embraced in section 5627 of the Revised Codes of 1899. That section, after providing that, in actions tried to the court, questions of fact may be reviewed in this court, whether a motion for a new trial was or was not made in the action, proceeds in the last part of the section to prohibit a trial of questions of fact in this court in jury cases, unless a motion for a new trial is first made in the district court. This section, construed with others relating to new trials, leaves it optional with the moving party in jury cases to move or not to move for a new trial in the district court; but, if the motion is not made below, no review of questions of fact can be had in the supreme court. The precise question presented by this objection of counsel was passed upon and ruled adversely to the views of the respondent's counsel in Sanford v. Duluth etc. Elevator Co., 2 N. Dak. 6, 10, 48 N. W. 434, 435. It follows upon these authorities that this court cannot review questions of fact in this case, because the plaintiff has not seen proper to move for a new trial. But respondent's counsel insist that the assignment of error based upon the order directing a verdict necessarily involves questions of fact. In this counsel is in error. The motion for a directed verdict called only for a decision upon a question of law. In deciding such motion, the court was not required to reach a definite conclusion as to any ultimate fact at issue. It was called upon merely to determine whether there was competent evidence in the case reasonably tending to establish the material facts in issue. In this case the court held that there was a failure of proof on plaintiff's part as to material facts, and, so holding, ruled as a matter of law that there were no facts to be submitted to the jury. This ruling was a ruling upon a question of law, and none the less so for the reason that it was necessary for the court to consider and examine the evidence in reaching a conclusion upon such question: See authorities above cited.

This brings us to a consideration of the merits of the assignment of error based upon the order directing a verdict for the defendant. This order of the trial court was granted upon a motion therefor made by the defendant's counsel, and in their brief filed in this court defendant's counsel concede that for the purposes of such motion it must be assumed that the evidence in the case was sufficient to establish all the material facts alleged in the complaint, excepting only the facts necessary to be established in order to place the plaintiff in a position to claim the benefits of the statute regulating exemptions of personal property; but as to this feature the contention of respondent's counsel is that the testimony wholly failed. The trial court was of the opinion that the plaintiff had failed upon this feature of the case, and the presiding judge stated in effect, in directing a verdict, that section 3625 limited the exemption to the head of a family, and that the statute provides that the husband is the head of the family, and that in this case [590] the evidence failed to show that the headship of the Ness family had from necessity ceased to be in the husband and had become vested in the wife. Is this view of the matter sound? The order of the district court directing a verdict presupposes that a married woman is not primarily, and as a necessary result of her marital relation, the "head of a family," and as such entitled unconditionally to the benefits of the exemption law as to personal property. The trial court, it seems, assumed that under certain exceptional conditions which may be shown to exist, a married woman may become entitled to such benefits, and, finally, the court below assumed that in the case at bar the plaintiff has wholly failed to show by testimony that her husband is not, and that she is, the head of the Ness family.

The legal problem presented for solution is one of no little difficulty, and we have reached our conclusions with some degree of doubt. Our chief difficulty arises upon the construction placed upon the language of said section 3625, supra, and this is occasioned by the very brief and meager language employed by the legislature in subdivision 1 of that section. This section is an innovation, in so far as it declares that the wife, when a claimant, is included within the meaning of the phrase "head of a family," and the last part of the subdivision, which declares that "in no case are husband and wife entitled each to a homestead," is obscure, in this: That such limitation upon the rights of married persons is by its terms confined to the family homestead, and means, of course, that in no case shall one family

have more than one homestead which is exempt from seizure and sale on legal process. But no terms used in said subdivision warrant the conclusion that the legislature intended to limit the right of married persons to one, and only one, statutory exemption of personal property. If that was the legislative purpose, it must follow as a result of a construction of all the law bearing upon the subject matter of exemptions. Nor is the uncertainty in any degree removed by anything found in section 5516, which goes no further than to declare that personal property to an amount specified shall be exempt "to the head of a family as defined by chapter 39," which chapter relates to homesteads, in which is found section 3625, wherein, as has been said, a wife is included within the meaning of the phrase "head of a family." It must be conceded that the language of the section last cited, when considered by itself, gives no preference to either the husband or the wife, and that it declares that the wife, as well as the husband, is included in the phrase "head of a family."

But the practical difficulties of giving the language of subdivision 1 of section 3625 a literal construction are obvious. The statute is entirely silent upon the question of whether, in a case such as this, where both husband and wife are debtors and claimants, one or both are entitled to an exemption, and, if both, whether the total exemption is limited to the maximum of property or [591] value specified in the statute, and, if so limited, whether each may claim just one-half of the maximum, or whether the right of exemption, as to each claimant, may be otherwise adjusted as between husband and wife. No attempt was made by the legislature to make provision for the adjustment of any of the differences which would be precipitated in the event of a claim of exemption being made by both husband and wife in the same case. Such practical difficulties as those mentioned, with others which might be suggested, when considered in connection with the general scope and policy of the exemption laws of this state, as the same are revealed alike in the exemption statutes and in the mandate contained in section 208 of the state constitution, have forced this court to the conclusion that section 3625 must be interpreted in connection with all cognate law upon the subject of exemptions, and that, when so interpreted, it means that a wife may claim exemptions only in those exceptional circumstances in which the husband has been constructively deposed from his primary headship of the family and the wife has been invested therewith. The head of a family is, and

must remain, a unit. The term "head" implies a singular number, and never, in any connection found in these statutes, does it imply the plural number. Our conclusion is that a wife cannot, under section 3625, base a claim for exemptions upon the mere fact of her marital relation. She may, however, for the benefit of the family, claim exemptions when certain conditions are shown to exist which operate to cast upon her the rights and the responsibilities which appertain to the headship of a family. The distinctive purpose of our exemption laws, whether pertaining to the homestead or to personal property, is to afford to debtors (who are heads of families, and to none others) certain immunities which are intended to secure to the families of debtors the necessaries and comforts of life. To the mere debtor, not the head of a family, has not been accorded any of the immunities found in these humane provisions of the laws of the state. The exemption is made for the benefit of families, but nowhere in the law can be found a suggestion that any family is entitled under the exemption laws to claim or receive double immunity, and yet such would be the result in a case like this, if both husband and wife have a full legal right, each in his own behalf, to claim the maximum exemption.

In the case at bar the husband, a joint debtor, has asserted a claim for exemptions, and the sheriff has acquiesced in such claim and turned over to the husband the property claimed by him as exempt from execution, and the whole thereof. With reference to this fact counsel for the plaintiff calls our attention to the fact that the aggregate amount as claimed, respectively, by the husband and his wife—the plaintiff—is less than the maximum amount of personal property allowed by the statute for the benefit of a family, and so to this counsel say that it is in harmony with the legislative [592] purpose, and that the plaintiff, therefore, is not seeking to get a double allowance of property for her family. But this contention, from our point of view, clearly overlooks two considerations. It ignores the fact that the statute gives exemptions only to one person, viz., the head of the family, and also ignores the fact that nowhere in the statute is there found a restriction which will prevent a party who is entitled to the statutory exemption from receiving the full maximum of personal property allowed by the statute. The statute itself not containing any such restrictions upon this valuable right, the court would hardly venture to read into the statute a limitation upon the right, and, if it attempted to do so, we know of no rule which would measure the respective rights of

husband and wife, as between themselves, where each sought the full benefit of the exemption right in the same case.

Our conclusion that the husband is primarily the head of the family rests not alone upon the laws of nature, nor upon the sanctions of the common law. It is in this state further reinforced by express statutory enactments. Section 2764 of the revision of 1899 reads: "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." Section 2765 declares: "The husband must support himself and his wife out of his property or by his labor. The wife must support the husband, when he has not deserted her, out of her separate property when he has no separate property and he is unable from any infirmity to support himself."

The remaining questions for determination presented by the assignment of error under discussion relate to the evidence and are relatively of little difficulty. It is quite clear from this record that plaintiff's counsel deemed it necessary to show by testimony at the trial that the plaintiff, by reason of certain facts and conditions, had, from necessity, been placed in the relation of headship to her family; and a mass of evidence was put in by plaintiff for this express purpose, and the same is practically undisputed. Our duty is to consider this evidence, but to do so only so far as is necessary to decide whether there is any competent evidence in the record reasonably tending to sustain all the material facts necessary to sustain the cause of action alleged in the complaint. As already seen, the only fact which is not conceded to have been established is whether the plaintiff, at the time she demanded the property in dispute, was the head of her family. The trial court held that this vital fact had not been shown, and this court has reached the same conclusion. In doing so, we have put the most favorable construction upon the evidence offered upon this branch of the case. The facts shown by the evidence may be briefly stated as follows: Plaintiff and her husband have a family of eight children, all minors, save one. The family have resided many years upon a farm owned by the plaintiff, and the property in question consists of grain raised on the plaintiff's homestead. In [593] the year 1895 the plaintiff's husband embarked in the machinery business at a place about four miles distant from the home farm, and for some time carried on that business in connection with his farming business, which latter was carried on by the husband upon lands owned by him in the vicinity of the home farm. At

all times since their marriage the plaintiff and her husband have lived together as husband and wife, and there is no suggestion in the record that the conjugal relation has not at all times been entirely harmonious. The husband is a hard-working and able-bodied man, and nothing in the record indicates a want of ability in the husband, either physical or mental, to care for and maintain his family, or to provide them with the ordinary and necessary comforts of life. So far as the husband's health and strength are concerned, the evidence indicates ability on his part to discharge the duties incident to the headship of a family; nor does the evidence warrant the conclusion that the husband is not entirely willing to discharge such duties to the extent of his ability. But the evidence shows, further, that while the husband was carrying on his said machinery and farming business he left the matter of caring for the home and the children largely to his wife. She supervised the home farm, and attended to the wants of the children, purchased their clothing, and looked after their schooling. She did this, too, from resources drawn from the home farm, and with little substantial aid from the husband, except in the way of advice and some slight assistance about the home. The business of the husband resulted disastrously, and he was driven into bankruptcy, losing all his property.

Just here counsel contend that the husband, because of his financial straits, lost his original position of head of the Ness family, and for the same reason the plaintiff emerged from the background and appeared as the head of the family. We think this position is untenable. It would seem that, if a debtor ever needs the benefit of exemption laws, it is when he is in the greatest financial distress. If he has nothing save his hands with which to support his family, he should at least be permitted to hope that his first small acquisitions of property (acquired by manual labor) would not be seized to satisfy the demands of his creditors. Such property would be subject to seizure unless the husband claimed them as exempt; and he could not maintain his claim if he had ceased to be the head of a family, by reason of financial reverses or for any other reason. The law, as we construe it, will tolerate but one head and one exemption for one family. If a policy more liberal than this is desirable, it can be inaugurated only by the legislative branch of the government. It is not the province of the courts to create exemptions in cases where the lawmaker has withheld them. Nevertheless it is a fact of common experience, and one which

is only too familiar, that conditions sometimes exist in which the wife from dire necessity is compelled to assume the burdens and responsibilities which [594] belong to the headship of a family; and where such conditions arise, from necessity the courts, to aid the family of the debtor, have intervened and conferred upon the wife, in lieu of the husband, the immunities afforded by the exemption laws. The authorities cited below afford illustrations of this doctrine of the courts: See Linander v. Longstaff, 7 S. Dak. 157, 63 N. W. 775; Scholler v. Kurtz, 25 Neb. 655, 41 N. W. 642; State v. Houck, 32 Neb. 525, 49 N. W. 462; Ecker v. Lidskog, 12 S. Dak. 428, 81 N. W. 905; Van Doran v. Marden, 48 Iowa, 186. In the last case cited the court say: "When, however, marriage relation does exist, the headship of the family cannot depend upon circumstances of property held by parties. If this were so, the question involving the headship of the family would be one of fact and never of law. That it is a question of law, when the husband is resting under no disability, we think cannot be doubted." In none of the cases cited does the fact that the husband is a bankrupt and possesses no property figure as a factor in deciding the question whether he or his wife, who is residing with him, is the head of the family to which both belong. In the case at bar there is no evidence tending to show that the husband has deserted his family, or that he is either unable or unwilling to provide necessaries for his family, sufficient for their support, by the labor of his own hands. Nor does the fact that for a time the wife, out of the homestead and its products, aided only by her husband's advice, supplied the wants of the family, at all tend to show that the wife is entitled to the benefits of the exemption law.

We find no error in the judgment, and hence the same will be affirmed.

All the judges concurring.

Exemptions.—The Head of a Family is primarily the husband: See the monographic note to Wade v. Jones, 61 Am. Dec. 589; Barry v. Western Assur. Co., 19 Mont. 571, 61 Am. St. Rep. 530, 49 Pac. 148. For circumstance under which either the wife or husband may claim exemptions, see Boelter v. Klossner, 74 Minn. 272, 73 Am. St. Rep. 347, 77 N. W. 4. An abandoned wife succeeds to the homestead estate as head of the family: Lynn v. Sentel, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838. See further, on who is the head of a family, the monographic notes to Wike v. Garner, 70 Am. St. Rep. 107-115; Wade v. Jones, 61 Am. Dec. 586-593.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

PEOPLE'S BUILDING, LOAN AND SAVING ASSOCIATION v. BERLIN.

[201 Pa. St. 1, 50 Atl. 308.]

BUILDING AND LOAN ASSOCIATIONS—DOING BUSINESS IN ANOTHER STATE—USURY.—A building and loan association, having its office in the state of its domicile, where, under its constitution and by-laws its business must be conducted, all payments made, and all contracts passed upon, does not, by making a loan in another state to a citizen thereof, through its agent therein, and taking a mortgage on land therein as security, make a contract governed by the usury laws of the latter state, nor does it do business therein within the meaning of a statute requiring the registration of foreign corporations. In such case the contract is made and to be performed at the domicile of the corporation. (pp. 768, 769.)

C. M. Elliott and E. R. and G. B. Mayo, for the appellant.

G. A. Berry, R. L. Edgett, and E. E. Tait, for the appellees.

POTTER, J. It appears from the record in this case that a citizen of Pennsylvania executed a mortgage to a foreign building and loan association, upon property in Pennsylvania. Default having been made, a scire facias was issued, and, by agreement of the parties, the case was tried without a jury. The validity of the mortgage was sustained, and judgment entered for the amount found due. On appeal to the superior court, the judgment was reversed, on the ground that the transaction involved an investment of part of the capital of the plaintiff company within the state of Pennsylvania, through an agency within the state, for the prosecution of the company's corporate business, in violation of the act of April 22, 1874.

The plaintiff is a building and loan association, incorporated under the laws of the state of New York, with its principal office at Geneva, in the said state. It had not complied with the provisions of our act of assembly of April 22, 1874, with reference to foreign corporations, at the time of the execution and delivery of this mortgage, but shortly afterward an attempt was made to comply with the act. Under the view which we take of the case, we do not deem this important. The mortgage contains the following recital:

"This grant is intended as a security for the payment of the sum of five hundred dollars, in the manner following—that is to say, the sum of five dollars contribution or principal, and two dollars and eight cents interest, and two dollars and nine cents premium each and every month from the date hereof, for such term as will secure to the said the People's Building, Loan and Saving Association, the payment of the full sum of one hundred dollars on each and every one of the mortgagor's shares thereby secured to be paid, such payments to commence on or before Saturday, November 30, 1889, and to be continued and made on or before the last Saturday of every month thereafter, until the said five shares are fully matured, and also for the payment of all dues, fines and penalties that may be imposed upon the said George T. Berlin, as member of said association, pursuant to the articles of association and the by-laws thereof, to be paid into the [4] treasury of the said association, according to the conditions of a bond this day executed and delivered by the said George T. Berlin, to the party of the second part," etc.

The bond and mortgage and the defendants' subscription to the stock of the association were practically parts of one transaction, intended to secure the payment of a loan of money, upon which the rate of interest was greater than the legal rate in Pennsylvania, but which did not exceed that of New York. The whole arrangement was in accord with the regular and authorized course of business of the plaintiff association. The eighth paragraph of the terms and conditions of the defendants' certificate of stock is as follows: "The articles of association, by-laws, terms and conditions, together with the application, are to be construed together as the contract between the shareholder and the association."

The first inquiry, then, is, as to whether the agreement was a New York or a Pennsylvania contract. If the former, then the usury laws of Pennsylvania do not apply. This is clearly

settled in Bennett v. Building etc. Assn., 177 Pa. St. 235, 55 Am. St. Rep. 726, 35 Atl. 685. As stated in the opinion in that case: "The fact that the plaintiff lived in Pennsylvania and negotiated there with an agent of the defendant, either for the membership or for the loan, is not of the slightest significance. The contract must be adjudged by its expressed terms, no matter where the parties were when it was made."

The proposition cannot be disputed that contracts are to be governed by the law of the place where they are to be performed. Where was this contract to be performed? Turning to the articles of association, we find that they provide for the organization of the plaintiff as a body corporate, with its principal office at Geneva, New York, with the usual executive officers, together with trustees, and a board of managers or directors. With regard to the funds, it is made the duty of the secretary "to receive all moneys paid into the association, and to pay the same over to the treasurer." Loans can only be made by the board of directors, for, by article 8, section 2, "it shall be the duty of the board of directors to judge of the sufficiency of all property offered as a security for advances and loans and attend generally to the financial affairs of the association." Provision is also made for the payment of all [5] installments upon the shares, and all fines and penalties, "to the association." The transfer and withdrawal of stock can only be made by giving the secretary notice, and procuring an entry to be made upon the books of the association.

All these provisions go to show that the fundamental intent was to conduct and control the business at the home office. The by-laws are equally explicit. For instance, article 5: "All applications for loans shall be examined and accepted or rejected by the board of directors." By article 16: "All remittances for admission, weekly and quarterly installments, fines, penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at their principal office in Geneva, New York." And by article 24: "No payment of any kind shall be credited to a shareholder until received by the secretary at the principal office." By an amendment of article 1 of the by-laws: "All moneys to be paid by the association on account of its shares of stock, or otherwise, shall be payable at the home office of the association at Geneva, New York, after acceptance and approval of satisfactory proofs." By article 25, as amended: "Any shareholder desiring a loan from the association by way of advance on his shares

shall have his real property, offered as security for such advance, appraised by three shareholders of the association, appointed by the board of directors; or in such other manner as shall be satisfactory to the board of directors; such appraisal shall be in writing, and returned with his application for such advance, together with his official search, to the board of directors, and if said appraisal and official search shall be approved by the board of directors, the shareholder shall be entitled to receive a loan, by way of advance," etc. Throughout the by-laws it is provided that, wherever notice is required, it is to be given to the secretary of the association. It is everywhere apparent that the business of the association could only be consummated at the home office.

In this particular case the application for stock and loan was made through plaintiff's agents at Bradford, Pennsylvania, but was forwarded by them to the office at Geneva, New York, where it was acted upon, and the contract thus completed.

The conclusion is inevitable that, under the articles and the by-laws, as well as by the terms of the bond and mortgage, the payments were to be made in the state of New York. In so far, therefore, as the defense is founded upon a claim or usury, it cannot be sustained.

The remaining question for consideration is, whether the transaction on the part of the plaintiff was such a "doing of business" in Pennsylvania as is contemplated in the prohibition of the act of April 22, 1874. As we have already seen, under the articles of association and the by-laws, and as a matter of fact, the business of the association was done in New York. Its corporate functions were all exercised there. The applications for stock and for the loan were made and considered in New York and there accepted. By the express terms of the by-laws, the money paid by the stockholders and borrowers was to be paid there, as was also the payment of the money to the defendant by the association in the completion of the transaction. In the contemplation of the law, the entire contract, from inception to the finish, was performed in New York.

The opinion of the superior court seems to be grounded upon the assumption that the transaction involved the investment or employment of a part of the plaintiff's capital within the state of Pennsylvania. The money was, however, loaned on the bond, a New York contract, and the mortgage was given merely as security. The plaintiff took no title to any property in Pennsylvania by the transaction. It merely made a loan of

part of its capital to one of its shareholders, who was a citizen of Pennsylvania. The capital, if employed in the state of Pennsylvania, was so employed by a citizen of Pennsylvania, and not by the plaintiff corporation. In so far as the business of loaning money was concerned, it was carried on in the state of New York, and not in the state of Pennsylvania. If the operations of the plaintiff be measured by the test of agency, they will not be found, under the decisions, to be in violation of the act of 1874. The act of a foreign corporation in selling goods here by agents and shipping the goods to purchasers is not doing business in this state, within the prohibition of the act: Mearshon v. Pottsville Lumber Co., 187 Pa. St. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Wolff Dryer Co. v. Bigler & Co., 192 Pa. St. 466, 43 Atl. 1092. The most that can be said of the plaintiff is, that it had an agency at Bradford, by which its shareholders in that vicinity were more conveniently enabled to do business with the home office of the plaintiff corporation in New York.

The superior court in its opinion in Blakeslee Mfg. Co. v. Hilton, 5 Pa. Sup. Ct. 192, sums up a number of the cases when it says: "As to the legal scope of the words, 'doing of business in this commonwealth,' we obtain some light from the decision in Commonwealth v. Standard Oil Co., 101 Pa. St. 119, where it was held that the purchase of crude oil in this state and the shipment thereof to other states to be refined, did not constitute doing business within the meaning of our tax laws. So, in Commonwealth v. American Tobacco Co., 173 Pa. St. 531, 34 Atl. 223, it was decided that the taking orders and selling by sample by agents of a foreign corporation did not make it liable for a mercantile tax, under an act of assembly imposing the same on 'every person who shall deal in the selling of any goods, wares and merchandise.' See, also, Kilgore v. Smith, 122 Pa. St. 48, 15 Atl. 698, wherein it is said that one of the objects of the act of 1874 was to bring corporations employing capital in this state and doing business here within the taxing power of the commonwealth. 'It does not appear,' said the court, 'that this corporation brought any of its capital into this state. Its place of business was in Maryland; its capital, if it had any, was there. It had contracts with some of its members, residing in Pennsylvania, by which they were to can their fruit and hold the same to be disposed of by the corporation.' For these and other reasons it was held that the corporation was not subject to the act of 1874."

In the present case the learned trial judge did affirm the defendant's third request for findings of fact, which was as follows: "At the date of the transaction involved in this controversy the plaintiff corporation was employing a portion of its capital in making loans in the city of Bradford, county of McKean, and commonwealth of Pennsylvania, such loans being secured by mortgages on real estate in the said city." But this finding does not involve the deduction sought to be drawn from it by the appellee, nor does it warrant the conclusion of law contended for. No such result was in the contemplation of the learned trial judge, for, in answering the defendant's fifteenth request for finding of facts, he refused to find that [8] the employment of capital in making loans to residents of Pennsylvania, and the loan of the defendant, was a "doing of business" within the contemplation of the act of assembly. The loan was made by the plaintiff in the state of New York. True, it was made with the knowledge that the capital so loaned was to be used by the borrower in the State of Pennsylvania. The action of the plaintiff was, however, bounded by the fact of making the loan. It could no more be said to be doing business with its capital in Pennsylvania, under such circumstances, than a bank can be said to be engaged in the iron business or in the lumber business, because of the fact of its loaning money to an iron manufacturer or a lumber dealer.

Great reliance seems to have been placed upon the case of Swing v. Munson, 191 Pa. St. 582, 71 Am. St. Rep. 772, 43 Atl. 342, as sustaining the position of the appellee, but the question there was entirely different from that now under consideration. It did not involve the construction of the act of 1874. The question was as to the right to solicit and effect insurance within the state without complying with the stringent provisions of the act of April 4, 1873. Insurance cases stand upon a basis of their own. The business of insurance has been held not to be commerce, as an insurance policy has been defined merely to be a contract of indemnity, and, for this reason, not protected as interstate commerce. The case of Swing v. Munson, 191 Pa. St. 582, 71 Am. St. Rep. 772, 43 Atl. 342, can, therefore, have no application to the question in hand.

Our conclusion is, that the facts disclosed by this record do not make the case within the prohibition of the act of April 22, 1874.

It is therefore ordered that the judgment of the superior court be reversed, and that of the trial court be reinstated, and

that judgment be entered in favor of the plaintiff for the sum of two hundred and sixty-nine dollars and sixty-eight cents, with interest from March 28, 1899, and costs.

A Loan by a Corporation to a Citizen of Another State, secured by a mortgage on land in that state at usurious interest there, is governed in the settlement of interest on foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is solvable by the laws of the state of the domicile of the corporation, and is made with reference to its laws: Meroney v. Atlanta etc. Loan Assn., 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. See, further, National Loan etc. Assn. v. Burch, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837; Hale v. Cairns, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; Binghamton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

A Foreign Corporation Does Business within a state if it makes a single loan to a resident and takes a note secured by a mortgage upon real property situate within the state, though the note is payable in the state wherein the corporation has its residence: State v. Bristol Sav. Bank, 108 Ala. 8, 54 Am. St. Rep. 141, 18 South. 533. See, further, Commercial Bank v. Sherman, 28 Or. 573, 52 Am. St. Rep. 811, 43 Pac. 658; monographic note to Abbeville etc. Co. v. Western etc. Co., 85 Am. St. Rep. 914-917.

FRANKLIN FIRE INSURANCE CO. v. BRADFORD.

[201 Pa. St. 32, 50 Atl. 286.]

FORGERY is the fraudulent making of some writing to the prejudice of another's right. (p. 772.)

AGENCY—FORGERY.—An agent who signs his principal's name in the course of the latter's business, without fraudulent intent, and without benefit to himself, is not guilty of forgery. (p. 772.)

AGENCY—LIABILITY FOR UNAUTHORIZED ACT OF AGENT WITHIN SCOPE OF EMPLOYMENT.—A principal is civilly liable to third persons for the acts, even if tortious, of his agent, if done in the course of his employment, although the principal did not authorize the acts or may have forbidden them. (p. 773.)

AGENCY—LIABILITY FOR ACTS OF AGENT.—A principal who has conferred general power on his agent cannot escape liability for a particular act of the latter, within the scope of the general power. (p. 774.)

AGENCY—LIABILITY FOR ACT OF SUBAGENT.—An insurance company is liable upon a policy properly signed and delivered by a subagent of its authorized agent without the actual knowledge of the latter, and although the company has expressly forbidden its agent to insure the property covered by the policy. (pp. 773, 774.)

AGENCY—LIABILITY OF AGENT FOR ACT OF SUBAGENT.—An insurance agent with power to sign and issue policies

and to collect premiums, who hires a subagent and permits him to sign and deliver policies and collect premiums, is liable to the insurance company for the act of the subagent in issuing a policy and collecting the premium, without the actual knowledge of the agent; on property which he as agent for the company has been expressly forbidden to insure. (pp. 773, 774.)

AGENCY—LIABILITY OF AGENT FOR ACT OF SUBAGENT—PRESUMPTION.—A general agent who employs a subagent and invests him with certain authority is liable for, and conclusively presumed to know of, all acts performed by the subagent within the scope of the authority given to him. (p. 774.)

EQUITY—LIABILITY FOR WRONGFUL ACT.—If one of two innocent persons must suffer for the wrongful act of a third, the loss must be borne by him who put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong. (p. 775.)

W. S. Moore, H. Hice, A. S. Moore, and A. Hice, for the appellants.

W. S. McConnel and J. M. Buchanan, for the appellee.

[34] DEAN, J. The defendant, Thomas Bradford, was a duly appointed agent of the Franklin Fire Insurance Company at New Brighton, Pennsylvania, with authority to effect insurance, countersign, issue and renew policies signed by the president and attested by the secretary at the office of the company in Philadelphia, to fix premium rates, receive money, and, in general, to attend to all the business of the company at New Brighton and the neighboring region; subject, however, to the rules, regulations of and such instructions as might, from time to time, be given him by the general officers of the company. The appointment was made in 1887, and Bradford continued to act under it until January 1, 1897. By their terms, policies had no force until countersigned by Bradford, the local agent. During his agency Bradford employed a subagent, one Hoyt, who was given by him general charge of Bradford's insurance business, and had access to all documents and blank policies, and was an occupant of his office in New Brighton. As such subagent for Bradford, he solicited policies, fixed rates, collected premiums, and filled blanks in policies, made daily reports to the company and signed Bradford's name to them. A short time before July 1, 1896, J. & E. Mayer, owners of a pottery factory at Beaver Falls, wrote to Bradford asking to renew insurance of fifteen thousand dollars, which Bradford had before that taken on their pottery for one year in the Franklin and other companies of which he was also agent, which policies were about to expire. In re-

sponse to the letter Hoyt went to the place of business of the pottery company, and delivered to the company policies aggregating fifteen thousand dollars to run for one year to take the place of those about to expire; among the renewal policies was one for two thousand dollars in the Franklin company, this appellant. The policy was signed by the president and attested by the secretary; it was also countersigned with the name of Thomas Bradford, agent. The total premiums on the whole fifteen thousand dollars were paid by one [35] check in the sum of two hundred and twenty-five dollars, drawn by the Mayers and pottery company, and payable to the order of Thomas Bradford; this check was deposited to the general account of Bradford in the National Bank of New Brighton; the amount of premium paid on this policy was thirty dollars.

On October 21st following, within the year, the pottery was destroyed by fire and the insurance company had to pay its share of the loss, the two thousand dollars covered by the policy. It will be noticed that the policy was delivered by Hoyt to the insured on July 1, 1896; but before that date, the insurance company, through its general state agents, had notified Bradford to issue no policies on the pottery, such property not being considered a satisfactory risk. While daily reports of the business had been made to the company by Bradford, no report was made of this risk. Bradford's name had been countersigned on the policy by Hoyt as if Bradford himself had written it, but without express authority from him, and without his actual knowledge. We may remark here, that while the evidence shows that there was no express authority to Hoyt by Bradford to sign Bradford's name to the policy, there was evidence from which such authority might have been inferred; but this is not material in the view we take of the question. We assume that Hoyt had no such authority. But the evidence fails to show, as argued, that Hoyt committed a criminal act—that is, a forgery, when he affixed Bradford's name. "Forgery is the fraudulent making of a writing to the prejudice of another's right." Evidence of the fraudulent intent is here almost wholly lacking. Hoyt earned the premium and the insured paid it over to Bradford, into whose account it entered, and he received the commission. Hoyt appropriated not one cent to his own use; nor does the evidence show that he benefited in the remotest degree by the act. There is no evidence indicating a fraudulent intent.

After paying the loss, the company brought this suit against Bradford to recover the amount paid, averring as a cause of action that their payment was occasioned by reason of Bradford's malfeasance and neglect of duty. The learned judge of the court below, after hearing the evidence, directed a verdict for defendant, on the grounds that Bradford had no knowledge of the delivery of the policy by Hoyt, nor any knowledge of the payment by the pottery company of the premium. From judgment [36] entered on this verdict plaintiff now appeals assigning for error the peremptory instruction of the court.

That Hoyt was the authorized agent of Bradford, the principal agent, is not questioned. This being the fact, the insurance company at once invokes the application of the rule: "The principal is responsible civiliter to third persons for the acts, even the tortious acts, of his agent, if done in the course of the agent's employment, although the principal did not authorize the acts or indeed may have forbidden them": Philadelphia etc. R. R. Co. v. Derby, 14 How. 468; Hower v. Ulrich, 156 Pa. St. 412, 27 Atl. 37; Brunner v. American Tel. etc. Co., 151 Pa. St. 447, 25 Atl. 29, and many other cases. How does the court below relieve the defendant from the application of the rule? It answers: 1. Bradford had no knowledge of the delivery of the policy; 2. He had no knowledge that Hoyt received the premium and deposited the same in the bank to his, Bradford's account.

That the policy when delivered fixed the liability of the company cannot be doubted; in fact, that liability was judicially decided by the common pleas, and the company had to pay. True, Bradford was not a party defendant to that suit, and is not concluded by that judgment, but he is a party to this one in which all the evidence has been heard, and we are constrained to hold that if the same evidence had been presented then, the judgment would have been the same. We turn, then, to inquire if the reasons given by the learned judge are sufficient to sustain the judgment. Assume the fact that Bradford had no specific knowledge of the delivery of this particular policy. But Hoyt was his agent for that very purpose; he had access to blanks in the office and had Bradford's authority to deliver them; he was not the agent of the company and had no authority from it; all his authority was derived from Bradford, and by reason of Bradford's authority the company was compelled to pay. What one does by another he does by himself. Hoyt, having general authority to take the blanks from the of-

fice, fill them up and deliver them, made the act that of Bradford. It does not follow that to be his act he must have handed this particular blank to Hoyt and have directed him to fill it up for the pottery company. Hoyt's general authority to fill up particular policies and receive the premiums would cover this particular act. The pottery company wrote to Bradford, asking [37] for the insurance; in response Hoyt took from the office the blank, filled it up and delivered it. As to Bradford, it must be conclusively presumed that he knew that Hoyt did just what he gave him opportunity and power to do. The principal who has conferred general power on an agent cannot escape answerability for a particular act of the agent within the scope of the general power. If the business was large and the distinct acts necessary to its transaction were numerous, it would be unreasonable to assume that the principal would have specific knowledge of each particular act; but this fact does not shield the principal. It only suggests extreme care in the selection of his agent. We hold that Bradford legally had knowledge of the act he gave his agent authority to perform. Second, the court holds that Bradford had no knowledge that any premium had been paid to Hoyt and credited to his account. The fact that the premium had been paid is important only in fixing the liability of the insurance company; a condition precedent to recovery is the payment by the insured of the premium. Bradford avers that Hoyt alone received the premium and deposited it to his, Bradford's, credit in the bank; that he had no knowledge of the fact. Here, again, knowledge must be conclusively presumed on his part. It is highly probable that among a large number of items to his credit in the bank he had no specific knowledge of this particular item, and he could probably say the same of most of the others. Depositors having large bank accounts generally send their agents or messengers with the funds in the shape of bills, checks or drafts to make the deposits and have little knowledge of the particular items. Here Hoyt made this deposit with many others to the credit of Bradford. Bradford had a right to know just what they were. He could by a mere examination of his own account have known whence came every dollar; no other had such right. If he chose not to exercise his right, to remain in ignorance, still the law will impute to him knowledge of how he became the owner of the money which stood in his name in the bank. It must be borne in mind that this is not a criminal prosecution where knowledge might be an important element

as showing intent, but is a civil suit for damages occasioned by neglect of an agent to obey the instructions of his principal. The evidence shows conclusively that Bradford flatly disobeyed [38] the instructions of the fire insurance company not to insure the pottery, and that by reason of this disobedience the company had to pay. In its most favorable aspect for defendant he comes under the rule, "that where one of two innocent persons must suffer from the wrongful act of a third, the loss should be borne by him who put the wrongdoer in a position of trust and confidence, and thus enabled him to penetrate the wrong."

The judgment is reversed and venire facias de novo awarded.

A Case Involving Precisely the Same Facts as the Principal Case, except that a different insurance company was affected thereby was decided in the circuit court of the United States in the same manner as the principal case, but the decision was reversed upon appeal: See Bradford v. Hanover Fire Ins. Co. of the City of New York, 102 Fed. 48. The opinion of the appellate court was as follows: "The court below rightly held that it was open to the defendant to show that the insurance company was not liable upon the policy in question, and therefore no question is presented under the tenth clause of the foregoing findings; but, upon the facts stated in the preceding clauses judgment was entered in favor of the plaintiff for two thousand eight hundred and three dollars and eighty-seven cents, and we are now to consider whether or not this judgment was well founded in point of law. The learned judge based it upon two grounds, and, as there is no other upon which it could have been rested, we may dispose of the case by examining those grounds separately.

"1. The principal is civilly responsible for some, but not for all, acts of his agent. This responsibility extends to the tortious acts of the agent, but only where they are committed for the principal's purposes and by his authority, either actual or apparent, or where he ratifies them, or accepts and retains some benefit from them: Flower v. Pennsylvania R. R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Brunner v. Telegraph Co., 151 Pa. St. 447, 25 Atl. 29; Hower v. Ulrich, 156 Pa. St. 412, 27 Atl. 37. In England, the principal's liability is, perhaps, somewhat more restricted. In his work on the Law of Torts, Pollock (Webb's edition, page 388) defines it thus: 'The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes.'

"But the decisions of the courts of this country have, we think, settled the rule in accordance with our statement of it, and with this in mind we pass to the consideration of the facts of the case.

"The declaration alleged that 'the defendant negligently, wrongfully, and fraudulently issued the said policy,' and upon the truth of this allegation the existence of the asserted right of recovery was absolutely dependent. Did the facts as found maintain it? Bradford, personally, 'did not disregard his instructions, nor did he negligently, wrongfully, or fraudulently issue or cause to be issued the policy of insurance now in controversy.' This the court found in its answer to one of the points submitted. Bradford, therefore, did not himself commit the tort which was the basis of the action. Did he do so by another? Hoyt, the actual tort feasor, was the agent of Bradford, with authority 'to solicit insurance, to collect premiums, and to deliver policies.' He forged the signature of Bradford to the policy, and he delivered that policy as and for a genuine one. But Bradford was not responsible for these unlawful acts merely because, for lawful purposes, Hoyt happened to be his agent. To make him responsible for them something more was requisite, and none of the conditions necessary to charge him was made to appear. Neither of the wrongful acts was committed for his purposes. The motive, whatever it was, was not his, but Hoyt's. It is also clear that Bradford neither expressly authorized them, nor ratified them, nor consented to profit by them.

"But, it is insisted that they were perpetrated in the line of Hoyt's employment, and with Bradford's apparent authority, and this contention presents the only serious question which is involved in the point now under consideration. Hoyt was not, in fact, authorized to sign Bradford's name, and the scope of his actual employment embraced the delivery only of policies which Bradford himself had signed. The signature in question was not so written as to indicate that it was made for Bradford, but as if made by him. It was simply a forgery. There was no assumption nor pretense of authority for it, and it is quite impossible to perceive that such authority apparently existed. The specific offense of Hoyt was one which Bradford himself was incapable of committing, and the act of the agent, therefore, was one which the principal not only could not have been justified in doing, but could not possibly have done: Seeber v. Commercial Nat. Bank, 77 Fed. 957. Nor was Bradford responsible for Hoyt's delivery of this policy. He was authorized to deliver genuine policies, not spurious ones; and of this particular transaction Bradford had no knowledge until after the fire and loss had occurred. If the forgery had been known by those to whom the policy was delivered, they certainly would not have been warranted in accepting it upon the supposition that its delivery was sanctioned by Bradford, or that, in making it, Hoyt was acting within the apparent scope of his employment. On the contrary, they must inevitably have seen that Bradford had not authorized it, and that Hoyt was grossly transcending the limits of his agency. The imposition which was consummated by the deliv-

ery had its inception in the forgery, and by that alone was the delivery made possible. Bradford did not—manifestly could not—authorize the forging of his own signature; and this being so, we are unable to discern, in his delegation of power to deliver policies bearing his genuine signature, any apparent authority for the delivery of one falsely and feloniously subscribed. In short, we are of opinion that, as Hoyt's principal, Bradford could be held liable, if at all, only upon the theory that the agency of Hoyt vested in him authority to sign the name of Bradford; and as such authority, either actual or apparent, did not exist, it remains only to consider whether Bradford is precluded from repudiating the transaction which Hoyt fraudulently effected.

"2. 'When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act': Stephen's Evidence, art. 102. This statement was intended (see note 38) to properly apply the doctrine of estoppel in pais to the case of a negligent act causing fraud, and we think that it does so. The vital principle of that doctrine is that: 'He who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted': Dickerson v. Colgrove, 100 U. S. 580.

"And, in a case like the present, it is essential to the estoppel that the person sought to be estopped shall be legally chargeable with negligence which in the natural course of things caused the other person to be misled to his prejudice; and negligence in fact is, as to this point, the specific wrong expressly alleged in the declaration. But in what respect was Bradford negligent? The learned judge of the circuit court placed his liability upon the ground that he had 'put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong.' We cannot assent to this. It was not pretended that Bradford was not duly careful in employing Hoyt or in retaining him in his employment. So far as appears, no ground existed for suspecting that he would abuse any confidence which was or might be reposed in him. Moreover, the signing of Bradford's name was not confided to him, nor had Bradford done anything to make it appear that it was. The policy was not accepted in reliance upon any seeming or supposed authority of Hoyt to sign, but under the belief that Bradford had signed it; and this misleading belief was caused, not by any negligent act or omission of Bradford, but solely by the personal criminal con-

duct of Hoyt. Bradford, it is true, had made Hoyt his agent; but surely negligence cannot be imputed to him upon that ground alone. Such agencies are by no means uncommon, and the reported cases exhibit many instances of them. There was no more reason for supposing that the agent in this instance would be guilty of forgery than of any other offense, and his principal was under no obligation to prevent his commission of crime. The whole duty of Bradford in the matter was to see to it that no negligence of his own should, through any wrongdoing of Hoyt, occasion injury to another, and this duty does not appear to have been violated.

"The true test of liability under this head was correctly applied by the supreme court of Pennsylvania in Leas v. Walls, 101 Pa. St. 57, 47 Am. Rep. 699. In that case one person had procured another to sign a promissory note, partly printed and partly in writing. In the form used there was a long blank for the insertion of the amount. The person who obtained the note had, before its execution, inserted in this blank the written word 'eight,' and had filled up the remaining portion of the blank, except a small space immediately after that word, with a scroll terminating with the printed word 'dollars'; but, after execution, he added to the word 'eight' the letter 'y,' so that, as thus altered, it read 'eighty' dollars. The action was brought by a bona fide purchaser of the note for value and before maturity, and yet the finding of the jury that there was no lack of ordinary care on the part of the maker of the note was expressly approved by the supreme court, and the judgment for defendant, which was entered upon that verdict, was affirmed. In its opinion, after referring to some of its earlier decisions, the court said: 'These cases do not decide that the maker would be bound to a bona fide holder on a note fraudulently altered, however skillful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. In the common experience of men, very few persons write their words so closely together that a single letter cannot be added at the end of one of them without attracting attention.' And common experience, we think, equally supports our belief that no man of ordinary prudence would think of taking any precaution to preclude such a forgery of his signature as that for which the plaintiff in error in this case has been charged with responsibility.

"We have examined a number of authorities, including those mentioned in the opinion of the court below and the additional cases cited by counsel; but we do not deem it necessary to further extend this opinion by reviewing them. It is enough to say that we have given them careful consideration, and are entirely satisfied that, as a whole, they show the law to be in accordance with the

views we have expressed. The judgment of the circuit court is reversed, and the cause will be remanded to that court, with direction to enter a judgment for defendant in the action."

LIABILITY OF A PRINCIPAL FOR THE UNAUTHORIZED ACTS OF HIS AGENT.*

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*REFERENCES TO MONOGRAPHIC NOTES.

Principal's liability for agent's unauthorized acts: 22 Am. St. Rep. 189, 190.
Acts of servant for which master is not answerable: 54 Am. St. Rep. 71-93.
Liability of master for torts of servant: 35 Am. Dec. 192-201.
Subagents and their relation to the principal and to the agent appointing them: 80 Am. St. Rep. 110-124.
Liability of master or principal for negligence or misconduct of servant or agent: 55 Am. Dec. 317-321.
Liability of employer for acts of contractor: 51 Am. Dec. 200-206.
Liability of city for unauthorized acts of its officers: 100 Am. Dec. 358-360.
Scope of employment: 40 Am. Rep. 226-229; 42 Am. Rep. 36-38.
When agent may disregard orders in emergency and still bind principal: 6 Am. St. Rep. 87.
Ratification of unauthorized acts by silence: 79 Am. Dec. 387-389.
Right to recover exemplary damages against principals and masters for acts of agents and servants: 62 Am. Dec. 379-389; 28 Am. St. Rep. 876.

I. In Contract.

a. Party Dealing with Agent must Ascertain Extent of Authority.

1. General Rule.—Ordinarily, one who deals with an agent does so at his peril. If the agent is acting in excess of or outside the powers conferred upon him by his principal, the latter is in no way responsible for such act. It is elementary that no man can be bound by the act of another, unless he has either expressly or impliedly authorized that other to act for him. Accordingly, one who seeks to hold another for the acts of a third person as his agent is bound to inquire into the existence and extent of the authority of the agent to act for his alleged principal, and is held chargeable with knowledge of the limitations imposed upon it. "Whoever deals with an agent is put on his guard by the very fact and does so at his risk. It is his right and duty to inquire into and ascertain the extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency, and will or will not bind the principal": Chaffe v. Stubbs, 37 La. Ann. 656.

In a few cases language is employed which would seem to lay down a contrary rule. Thus, in Trainer v. Morrison, 78 Me. 160, 57 Am. Rep. 790, it is said that: "Persons dealing with an agent have a right to presume that his agency is general and not limited, and notice of the limited authority must be brought to their knowledge before they are to regard it": Citing Methuen v. Hayes, 33 Me. 169. See, also, Wood v. Finson, 89 Me. 459, 36 Atl. 911; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50. These expressions are, however, probably intended as no more than enunciations of the well-settled rule that a principal will be bound by the appointed authority he has given his agent, and that secret limitations or private instructions cannot affect the rights of third persons acting in good faith. At any rate, the rule is well settled that one who deals with an agent is bound to ascertain the extent of his authority: Golding v. Merchant, 43 Ala. 705; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190; Blum v. Robertson, 24 Cal. 127; Lester v. Snyder, 12 Colo. App. 351, 55 Pac. 613; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393, 58 Pac. 358; American Oil Co. v. Gurr (Ga.), 14 S. E. 780; Schilling v. Rosenheim, 30 Ill. App. 81; Schneider v. Lebanon Dairy etc. Co., 73 Ill. App. 612; Leu v. Mayer, 52 Kan. 419, 34 Pac. 969; Blood v. Herring (Ky.), 61 S. W. 273; Johnson v. Wingate, 29 Me. 404; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563, 47 N. W. 328; Johnson v. Hurley, 115 Mo. 513, 22 S. W 492; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135; First Nat. Bank v. Hall, 8 Mont. 341, 20 Pac. 638; Hatch v. Taylor, 10 N. H. 538; Dowden v. Cryder, 55 N. J. L. 329, 26 Atl. 941; Mechanics'

Bank v. New York etc. R. R. Co., 13 N. Y. 633; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; Ferguson v. Davis etc. Co., 118 N. C. 946, 24 S. E. 710; Ellis v. Wait, 4 S. Dak. 454, 57 N. W. 229; Schull v. New Birdsall Co. (S. Dak.), 86 N. W. 654; Fabian Mfg. Co. v. Newman (Tenn. Ch. App.), 62 S. W. 218; Taylor Mfg. Co. v. Brown (Tex.), 14 S. W. 1071; Buzard v. Jolly (Tex.), 6 S. W. 422; Rosendorf v. Poling (W. Va.), 37 S. E. 555; Schlimmelpennich v. Bayard, 1 Pet. 264; National Bank of Oshkosh v. Munger, 95 Fed. 87, 36 C. C. A. 659.

3. Applicability to Various Classes of Agencies.

A. Special Authority must be Strictly Pursued.—This rule is particularly applicable to cases in which the agency is special. Such an agency is usually created for a certain definite purpose, its limits are quite clearly defined, and the authority conferred by it must be strictly pursued if the principal is to be bound: Wheeler v. McGuire, 86 Ala. 398, 5 South. 190; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 South. 29; Davidson v. Dallas, 8 Cal. 227; Sioux City etc. Seed Co. v. Magnes, 5 Colo. App. 172, 38 Pac. 330; Yates v. Yates, 24 Fla. 64, 3 South. 821; Phoenix Ins. Co. v. Gray (Ga.), 32 S. E. 948; Rietz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Thomas v. Atkinson, 38 Ind. 248; Johnson v. Wingate, 29 Me. 404; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Brown v. Johnson, 20 Miss. 398, 51 Am. Dec. 118; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch v. Taylor, 10 N. H. 538; Dawden v. Cryder, 55 N. J. L. 329, 26 Atl. 941; Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Joseph v. Struller, 25 Misc. Rep. 173, 54 N. Y. Supp. 162; Pacific Biscuit Co. v. Dugger (Or.), 67 Pac. 32; Loudon etc. Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 503, 78 Am. Dec. 390; Carmichael v. Buck, 10 Rich. 332, 70 Am. Dec. 226; Ellis v. Watt, 4 S. Dak. 454, 57 N. W. 229; Morton v. Morris (Tex. Civ. App.), 66 S. W. 94; Blane v. Proudfit, 3 Call, 207, 2 Am. Dec. 546; Fenn v. Harrison, 3 Term Rep. 757.

B. Where Warrant of Authority is Written.—Where, therefore, the authority of the agent is in writing, as where it is contained in a letter of attorney, it is the right and duty of a party dealing with him to call for the production of his warrant of authority. "It is well settled that a party dealing with an agent acting under a written authority must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him, and he must, at his peril, observe that the act done by the agent is legally identical with the act authorized by the power": Stainback v. Read, 11 Gratt. 281, 62 Am. Dec. 648; Rawson v. Curtiss, 19 Ill. 456; Quay v. Presidio etc. R. R. Co., 82 Cal. 1, 22 Pac. 925. This is especially true where the person dealing with the agent is for any reason charged with notice that the latter depends for his authority upon a written document, as where he has constructive notice by reason of the recordation of the letter of

attorney: Frink v. Roe, 70 Cal. 296, 11 Pac. 820; or where written authority is essential to the validity of the agency: Nixon v. Hyserott, 5 Johns. 58; distinguished in Sandford v. Handy, 23 Wend. 260; or where the agent, by the very manner of performing the act (as where he signs "per power of attorney"), indicates that his powers are derived from, and limited by a written instrument: Mount Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341; Atwood v. Munnings, 7 Barn. & C. 278. See, also, in this connection, North River Bank v. Aymar, 3 Hill, 262; Morton v. Morris (Tex. Civ. App.), 66 S. W. 94, and cases cited; Wells v. Michigan Mut. L. Ins. Co., 41 W. Va. 131, 23 S. E. 527.

C. General Agencies.—But the applicability of the rule is by no means limited to special agencies. The distinction between a general and special agency has been well said to be one of degree rather than of kind, and the principles governing the two are the same. A general agency "does not import an unqualified authority; but that which is derived from a multitude of instances": Lord Ellenborough, C. J., in Whitehead v. Tuckett, 15 East, 400. It may be, and usually is, broader than a special authority "confined to a particular instance," but it is by no means unlimited, and one who deals with an agent is equally bound to inquire into the extent of his authority, whether the agency be general or special. "To assert that in the one case the third person need not inquire whether what appears to be true is true, while in the other he must so inquire, is to set an artificial and inconvenient limit to the operation of the salutary doctrine of estoppel": Huffcutt on Agency, N. S., 132, citing Pole v. Leask, 33 L. J., N. S., 155.

b. Bound by Apparent Authority of Agent.

1. General Rule.—The principal is, however, bound for the acts of his agent, even though they exceed the authority actually conferred upon him, if they are within the apparent authority of the agent. In determining the liability of the principal, the question is not what authority was intended to be given the agent, but what authority a third person dealing with him is justified, from the acts of the principal, in believing was given the agent. An act wholly unauthorized and void as between the agent and his principal may be entirely within the powers which the agent has been held out to the world by his principal as possessing, and will, therefore, as between the principal and one dealing with the agent on the faith of this ostensible authority, be valid and binding on the former. Whatever the nature or extent of the authority of an agent as between himself and his principal, as between the latter and third parties the authority of the agent is that which the principal has caused or permitted him to appear to possess, and the agent may therefore bind his principal by any act within the scope of his apparent authority: Golding v. Merchant, 43 Ala. 705; A. G. Rhodes Furniture Co. v. Werdon, 108 Ala. 252, 19 South. 318; Little Rock

etc. Ry. Co. v. Wiggins, 65 Ark. 385, 46 S. W. 731; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Little Piftsburgh etc. Co. v. Little Chief etc. Co., 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760; Hagenman v. Bates, 24 Colo. 71, 49 Pac. 139; Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. 404; Louisville etc. R. Co. v. Tift, 100 Ga. 86, 27 S. E. 765; Union Stock Yard Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888; Cincinnati etc. Ry. Co. v. Davis, 126 Ind. 99, 25 N. E. 878; Barnett v. Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; German Am. Bldg. Assn. v. Droge, 14 Ind. App. 691, 43 N. E. 475; Leu v. Mayer, 52 Kan. 419, 34 Pac. 969; Columbia Land etc. Co. v. Tinsley, 22 Ky. Law Rep. 1082, 60 S. W. 10; Blood v. Herring, 22 Ky. Law Rep. 1725, 61 S. W. 273; Caldwell v. Neill, 21 La. Ann. 342, 99 Am. Dec. 738; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245; Shipman v. Byles, 65 Mich. 690, 32 N. W. 898; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; Verdine v. Ohrey, 77 Mich. 310, 43 N. W. 975; Tunison v. Detroit etc. Copper Co., 73 Mich. 452, 41 N. W. 502; Mason v. Taylor, 38 Minn. 32, 35 N. W. 474; Planters' Compress etc. Co. v. Ireys (Miss.), 16 South. 386; Potter v. Springfield Milling Co., 75 Miss. 532, 23 South. 259; Nicholson v. Golden, 27 Mo. App. 132; Harrison v. Kansas City etc. Ry. Co., 50 Mo. App. 332; Buckle v. Probasco, 58 Mo. App. 49; Webster v. Wray, 17 Neb. 579, 24 N. W. 207; Lorton v. Russel, 27 Neb. 372, 43 N. W. 112; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; Piano Mfg. Co. v. Nordstrom (Neb.), 88 N. W. 164; Hatch v. Taylor, 10 N. H. 538; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Fifth Ave. Bank v. Forty-second St. Ry. Co., 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378; Hanover Nat. Bank v. American Dock etc. Co., 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; Hardwick v. State Ins. Co. (Or.), 31 Pac. 656; Hubbard v. Tenbrook, 124 Pa. St. 291, 10 Am. St. Rep. 585, 16 Atl. 817; Aldrich v. Wilmarth, 3 S. Dak. 523, 54 N. W. 811; Galveston etc. Ry. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332; Garner v. A. Fisher Brewing Co., 6 Utah, 332, 23 Pac. 755; Smith v. Droubay, 20 Utah, 443, 58 Pac. 1112; Griggs v. Selden, 58 Vt. 561; Cushman v. Somers, 62 Vt. 132, 22 Am. St. Rep. 92, 20 Atl. 320; Winchell v. National Exp. Co., 64 Vt. 15, 23 Atl. 728; Graton etc. Mfg. Co. v. Redelsheimer (Wash.), 68 Pac. 879; Rohrbrough v. United States Exp. Co., 50 W. Va. 148, post, p. 849, 40 S. E. 398; Cannon v. Henry, 78 Wis. 167, 23 Am. St. Rep. 399, 47 N. W. 186; Hoyer v. Ludington, 100 Wis. 441, 76 N. W. 348; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108; Smith v. McGuire, 3 Hurl. & N. 554; Brocklesby v. Temperance Bldg. Soc., [1893] 3 Ch. 130.

2. Effect of Secret Instructions, etc.

A. Alike in Special and General Agencies.—Perhaps the most frequent application of this rule is where one has sought to limit

the authority of his agent by secret limitations or by private instructions as to the manner or mode of its executions. Such instructions are, however, uniformly held ineffectual as against third parties who, in ignorance of their existence, have dealt with the agent in reliance upon the apparent nature and extent of his authority.

A distinction is at times attempted in this connection between general and special agencies, and the effect of private instructions upon them. Thus, in a frequently quoted passage from Story on Agency, 115, it is said that in the case of a general agent "the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by these acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances." In the case of a special agent, it is said that "if the agent exceeds his special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority." In many cases, similar expressions are to be found, all to the effect that instructions to a special agent, even although private and secret, become, as it were, part and parcel of the authority itself, so that a special agent who exceeds his private instructions will not thereby bind his principal, while a general agent will, unless knowledge of such instructions have been brought home to the party with whom he deals.

There is, however, no such distinction. In a special agency, quite as much as in a general one, the principal is bound by the apparent authority with which he has clothed his agent, and no more in one case than in the other will he be permitted to escape this liability by private and secret instructions to the agent, unknown to the party with whom the latter deals. Even in the case of a special agency, a distinction is to be taken between what is properly a limitation of authority and what are mere private instructions given such agent by his principal.

"No man is at liberty to send another into the market to buy or sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent—that the instructions were limitations upon his authority—and that those with whom he dealt in the matter of his agency acted at their peril because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. Where private instructions are given to a special agent respecting the manner and mode of executing his agency, intended to be kept secret, and

not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid and bind his employer": Hatch v. Taylor, 10 N. H. 538. And to the same effect, see Beem v. Lockhart, 1 Ind. App. 202, 27 N. E. 239; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Mechanics' Bank v. New York etc. Ry. Co., 13 N. Y. 633; Smith v. McGuire, 3 Hurl. & N. 554.

B. General Rule.—With reference to contracts entered into by an agent, therefore, the principal will be bound by any act within the apparent limits of the agent's authority, without regard to the violation of any instructions, private in their nature, which the principal may have given the agent as to the manner of executing his authority. Such is the undoubted rule, and is sustained by almost innumerable authorities: Louisville Coffin Co. v. Stakes, 78 Ala. 372; La Fayette Ry. Co. v. Tucker, 124 Ala. 514, 27 South. 447; Lytle v. Bank of Dothan, 121 Ala. 215, 26 South. 6; Keith v. Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Liddell v. Sahline, 55 Ark. 627, 17 S. W. 705; Hamill v. Ashley, 11 Colo. 180, 17 Pac. 502; Paine v. Tillinghast, 52 Conn. 532; Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. 404; Georgia Military Academy v. Estill, 77 Ga. 409; Armour v. Ross, 110 Ga. 403, 35 S. E. 787; Noble v. Nugent, 89 Ill. 522; Union Mut. L. Ins. Co. v. White, 106 Ill. 67; Catholic Bishop of Chicago v. Trant, 61 Ill. App. 641; Lake Shore etc. Ry. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20; Cincinnati etc. Ry. Co. v. Davis, 126 Ind. 99, 25 N. E. 878; Banks v. Everest, 35 Kan. 687, 12 Pac. 141; Loomis Milling Co. v. Vawter, 8 Kan. App. 437, 57 Pac. 43; Dias v. Chickering, 64 Md. 348, 54 Am. Rep. 770; Markey v. Mutual etc. Life Ins. Co., 103 Mass. 78; Byme v. Massassoit Packing Co., 137 Mass. 313; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; Mason v. Taylor, 38 Minn. 32, 35 N. W. 474; Potter v. Springfield Milling Co., 75 Miss. 532, 23 South. 259; Gerhardt v. Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Harrison v. Kansas City etc. Ry. Co., 50 Mo. App. 332; Howell v. Graff, 25 Neb. 130, 41 N. W. 142; Oberne v. Burke, 30 Neb. 581, 46 N. W. 838; Cox v. Albany Brewing Co., 10 N. Y. Supp. 213, 56 Hun, 489; Smith v. Robinson Bros. Lumber Co., 88 Hun, 148, 34 N. Y. Supp. 518; Pacific Biscuit Co. v. Dugger (Or.), 67 Pac. 32; Harrington v. Bronson, 161 Pa. St. 296, 29 Atl. 30; Whaley v. Duncan, 47 S. C. 139, 25 S. E. 54; Galveston etc. Ry. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332; Smith v. Droubay, 20 Utah, 443, 58 Pac. 1112; Hall v. Union Cent. L. Ins. Co., 23 Wash. 610, 63 Pac. 505; Graton etc. Mfg. Co. v. Redelsheimer (Wash.), 68 Pac. 879; Rohrbough v. United States Exp. Co., 50 W. Va. 148, post, p. 849, 40 S. E. 398; Butler v. Maples, 9 Wall. 766; Foster v. Cleveland etc.

Ry. Co., 56 Fed. 434; Smith v. McGuire, 3 Hurl. & N. 554; Chapler v. Brunswick Building Soc., 50 L. J. Q. B. 372, 6 Q. B. D. 696.

C. Where Party Dealing with Agent has Knowledge of Instructions.—In this, however, as in other cases in which the apparent authority of the agent exceeds the authority actually conferred upon him, a principal will be bound to the extent of the apparent authority of the agent only where the person dealing with the agent had no knowledge that such was not his actual authority. The basis of the rule is estoppel, and the principal is ordinarily held liable on the ground that, having induced a third person to deal with the agent in reliance upon the possession by the latter of certain powers, the principal will thereafter be estopped from disputing the existence of such powers in the agent. If, however, the party dealing with the agent knows at the time of the limited authority of the agent, he cannot hold the principal for any act of the agent in excess of that authority, even although to one ignorant of the real facts the agent's apparent authority would have covered the act in question. "A principal may confer as much or as little authority as he sees fit upon his agent, and he may also impose such lawful restrictions and limitations upon his agent as may be deemed proper, and such restrictions and limitations will be as binding upon third persons who have notice of them as upon the agent himself, provided the principal does nothing to waive them": American Lead Pencil Co. v. Wolfe, 30 Fla. 360, 11 South. 488. To the same effect see Longworth v. Conwell, 2 Blackf. 469; Russell v. Cox, 18 Ky. Law Rep. 1087, 38 S. W. 1087; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Leathers v. Springfield, 65 Mo. 504; Jewett v. Chicago etc. Ry. Co., 45 Mo. App. 58; White v. Massey, 65 Mo. App. 260; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5. "To bind the principal for an unauthorized act of the agent, he must not only hold him out, but the apparent authority must be relied on in good faith and in the exercise of reasonable prudence, by the party invoking the conclusive presumption of authority": Rail v. City Nat. Bank of Ft. Worth, 8 Tex. Civ. App. 557, 22 S. W. 865.

II. In Tort.

a. In General.—With reference to the liability of an employer for the torts of his employé, the principles governing in the case of principal and agent are identical with those applicable to the relation of master and servant. Indeed, the exact distinctions between the two relations is by no means clear. The liability of a master for the torts of his servant has been already quite exhaustively treated (see monographic notes to Ware v. Barataria etc. Canal Co., 35 Am. Dec. 192-202, and to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 71-93), and the following discussion will therefore be limited in the main to a consideration of the general principles governing such liability.

b. Liable for Acts within Scope of Employment.

1. General Rule.—The principal is liable for any tort committed by his agent in the line of, and within the scope of, his employment, although the act complained of was not authorized or sanctioned by the principal, and was even in violation of his instructions. Having employed another to perform certain acts, he is responsible for the manner in which those acts are performed. "If he employs incompetent or untrustworthy agents, it is his fault; and, whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat superior applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him": Higgins v. The Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293. To the same effect, see Gilliam v. South etc. Ry. Co., 70 Ala. 268; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Church v. Mansfield, 20 Conn. 284; Wheeler v. Boars, 33 Fla. 696, 15 South. 584; Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 15 S. E. 831; Johnson v. Barber, 10 Ill. 426, 50 Am. Dec. 416; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Pittsburgh etc. Ry. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675; McKinley v. Chicago etc. Ry. Co., 44 Iowa, 314, 24 Am. Rep. 748; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; Johnson v. Small, 5 B. Mon. 26; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 South. 631; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Baltimore etc. Ry. Co. v. Blocher, 27 Md. 278; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400; Locke v. Stearns, 12 Mass. 560, 35 Am. Dec. 382; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; Larson v. Fidelity Mut. L. Assn., 71 Minn. 101, 73 N. W. 711; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482; Lee v. Village of Sandy Hill, 40 N. Y. 442; Hussey v. Norfolk etc. Ry. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Little Miami Ry. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; Luttrell v. Hazen, 3 Sneed, 20; Bess v. Chesapeake etc. Ry. Co., 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234; Enos v. Hamilton, 24 Wis. 658; Philadelphia Ry. Co. v. Derby, 14 How. 468; Heenrich v. Pullman Palace Car Co., 20 Fed. 100; Mackay v. Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31; Venable v. South, 2 Q. B. Div. 279; and cases cited in monographic note to Goodloe v. Memphis etc. Ry. Co., 54 Am. St. Rep. 72.

2. Basis of Rule.—This liability for the torts of an agent is not based upon the ground of the existence of an authority, express or implied, to do the act from which the injury resulted. "The prin-

cipal is bound by a contract made in his name by an agent, only when the agent has an actual or apparent authority to make it; but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it": Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293. The principal is liable for the torts of his agent within the scope of his employment, not, in the great majority of cases, because he has authorized him to commit them, nor yet because he has held him out to the world as having apparent authority to commit them, but because, within the scope of his employment, the act of the agent is the act of the principal. Qui facit per alium, facit per se. And where one of two innocent persons must suffer from the wrongful act of a third person, it is but reasonable that the principal who has placed the agent in the position to do the wrong should suffer rather than a stranger: See Lee v. Village of Sandy Hill, 40 N. Y. 442; Hern v. Nichols, 1 Salk. 289.

3. Liability of Corporations.

A. General Rule.—Among the numerous subtleties arising out of the incorporeality of a corporation was the doctrine long held that a corporation having "no mouth with which to utter slander, or hand with which to write libels or commit batteries, or mind to suggest malicious prosecutions or other wrongs," was incapable of committing any tort, except, perhaps, one of nonfeasance. The doctrine was, however, as said by Erle, C. J., in Green v. London General Omnibus, 7 Com. B., N. S., 290, "more quaint than substantial," and is no longer followed. It is now well settled, therefore, that a corporation is liable for the torts of its agents in the same manner and to the same extent as is any private person. The act and the intent of its agent is that of the corporation, and it is liable for his wrong, whether it be negligent, fraudulent, or malicious, if it be but done in the scope of his employment: Jordan v. Alabama etc. R. R. Co., 74 Ala. 85, 49 Am. Rep. 800; Goodspeed v. East etc. Bank, 22 Conn. 530, 58 Am. Dec. 439; St. Louis etc. Ry. Co. v. Dalby, 19 Ill. 353; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; Moore v. Fitchburg R. R. Co., 70 Mass. 465, 64 Am. Dec. 83; Ramsden v. Boston etc. Ry. Co., 104 Mass. 117, 6 Am. Rep. 200; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 39 Am. St. Rep. 467, 35 N. E. 776; Larson v. Fidelity Mut. L. Assn., 71 Minn. 101, 73 N. W. 711; State v. Morris etc. Ry. Co., 23 N. J. L. 360; Lee v. Sandy Hill, 40 N. Y. 442; Hussey v. Norfolk etc. Ry. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; Denver etc. R. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; Heenrich v. Pullman Palace Car Co., 20 Fed. 100; Edwards v. Midland Ry. Co., 50 L. J. Q. B. 281, L. R. 6 Q. B. Div. 287; Eastern Counties Ry. Co. v. Broom, 6 Ex. 314.

B. For Ultra Vires Acts.—Likewise, it has been contended, in an effort to absolve corporations from liability for the affirmative wrongs of their agents, that as a corporation has no lawful authority to order an unlawful act to be done, or to order a lawful act to be done in an improper way, or so that it shall violate the rights of others, it cannot be held chargeable with such an act when done by its agent. The result of any such doctrine is to release a corporation from any responsibility for a wrongful act, on the ground that its charter gives it no right to perform unlawful acts of that nature. The rule is, however, quite the opposite, and the law is well settled that a corporation is liable in such a case. "It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong": Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 39 Am. St. Rep. 467, 35 N. E. 776, and cases cited. To the same effect see St. Louis etc. R. R. Co. v. Dalby, 19 Ill. 353; Ramsden v. Boston etc. Ry. Co., 104 Mass. 117, 6 Am. Rep. 200; State v. Morris etc. Ry. Co., 23 N. J. L. 360; Lee v. Sandy Hill, 40 N. Y. 442; Hussey v. Norfolk etc. Ry. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Gulf etc. Ry. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744.

c. Not Liable for Acts Outside of Scope of Employment.—While the liability of a principal for the torts of his agent is not dependent upon or limited by the extent of the authority which he has delegated to him, the principal is not, it is well settled, liable for every wrongful act committed by his agent. He is bound only for such wrongs as the agent committed while in the line of performing his principal's business and within the "scope of his employment." A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment: Morier v. St. Paul etc. Ry. Co., 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952. And to same effect, see Gilliam v. South etc. R. R. Co., 70 Ala. 268; Pine Bluff Water etc. Co. v. Schneider, 62 Ark. 109, 34 S. W. 547; Daley v. Quick, 99 Cal. 179, 33 Pac. 859; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635; Marsh v. South Carolina Ry. Co., 56 Ga. 274; Hancock v. Singer Mfg. Co., 174 Ill. 503, 51 N. E. 820; Evansville etc. Ry. Co. v. Baum, 26 Ind. 70; Golden v. Neubrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; Ware v. Barataria etc. Canal Co., 15 La. 169, 35 Am. Dec. 189, and monographic note; Stickney v. Munroe, 44 Me. 195; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Lamm v. Port Deposit etc. Assn., 49 Md. 233, 33 Am. Rep. 246; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Brown v. Jarvis Engineering Co., 166 Mass. 75, 55 Am. St. Rep. 382, 43 N. E. 1118; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; McCoy v. McKowen, 26 Miss.

487, 59 Am. Dec. 264; Gueretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Walker v. Hannibal etc. R. R. Co., 121 Mo. 575, 42 Am. St. Rep. 547, 26 S. W. 360; Andrews v. Green, 62 N. H. 436; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722; Hussey v. Norfolk etc. R. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Little Miami Ry. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Bald v. Yohn, 26 Pa. St. 482; Getty v. Pennsylvania Institute etc., 194 Pa. St. 571, 45 Atl. 333; Luttrell v. Hazen, 3 Sneed, 20; Cantrell v. Colwell, 40 Tenn. 471; International etc. Ry. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Bess v. Chesapeake etc. Ry. Co., 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234; Bradford v. Hanover Fire Ins. Co., 43 C. C. A. 310, 102 Fed. 48; Croft v. Alison, 4 Barn. & Ald. 590.

d. **Disobedience of Instructions Immaterial.**—The difficulty in this connection lies in the determination of what acts are within the "scope of the employment" or agency. The phrase is obviously inclusive of more than the actual authority conferred by the principal on his agent, and an act of the latter may well be (and in the case of torts ordinarily is) within the "scope of the employment," although as between the principal and his agent it amounts to a violation of the latter's duty.

Thus, it is well settled that an act of the agent may render the principal liable for its consequences, although it was performed by the agent in disobedience of the orders of his employer. The application of the rule respondeat superior does not depend upon the obedience of the servant to his master's orders: Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482. See, also, Pine Bluff Water etc. Co. v. Schneider, 62 Ark. 109, 34 S. W. 547; Pittsburgh etc. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675; Wilton v. Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Lee v. Sandy Hill, 40 N. Y. 442; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; McClung v. Dearborne, 134 Pa. St. 396, 19 Am. St. Rep. 708, 19 Atl. 698; Burnett v. Oechsner, 92 Tex. 588, 71 Am. St. Rep. 880, 50 S. W. 562; Cook v. Houston etc. Nav. Co., 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475; Gregory v. Ohio etc. R. R. Co., 37 W. Va. 606, 16 S. E. 819; Philadelphia etc. R. Co. v. Derby, 14 How. 468.

e. **Motive of Agent Immaterial—Willful and Malicious Acts.**—Nor is the motive which prompted the tortious act material in determining whether the act was or was not within the scope of the agent's employment. The act may be within the scope of the agency, although willful, wanton and malicious, and it may be entirely outside the scope of the agent's employment although the motive was to benefit the principal and the element of willful wrong was entirely lacking.

The older rule was otherwise, however. Under it the principal was liable for any negligence of the agent, but not for his willful wrong. This doctrine, enunciated by Lord Kenyon in McManus v. Crickett, 1 East, 106, was upheld by a numerous line of cases, and was based upon the theory that in performing a wrongful act willfully the agent departed from his employer's business, and engaged upon a matter of his own, for the consequences of which the principal was not liable: Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507. See to the same effect, Turner v. North Beach etc. R. Co., 34 Cal. 594; Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154; Church v. Mansfield, 20 Conn. 284; Illinois Cent. R. R. Co. v. Downey, 18 Ill. 259; De Camp v. Mississippi etc. R. R. Co., 12 Iowa, 348; Southwick v. Estes, 61 Mass. (7 Cush.) 385; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222; Wilson v. Peverly, 2 N. H. 548; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; and New York cases cited in note to Wright v. Wilcox, 32 Am. Dec. 511; Yerger v. Warren, 31 Pa. St. 319.

The more modern and the better rule is that the principal is liable for all acts of his agent, whether malicious or negligent, if done in the exercise of the functions of the employment. If the agent, while acting within the range of the authority, does an act injurious to another, the principal is liable therefor, without reference to whether the intent of the agent was good or ill, innocent or malicious. The liability of the principal depends not upon the motive of his agent, but upon the question whether in the performance of the act which gave rise to the injury the agent was engaged in the service of his employer. Accordingly, it is now quite uniformly held that a principal is responsible for even the willful, wanton, or malicious acts of his agent, if they are done in the execution of the authority conferred upon him: Gilliam v. South etc. R. R. Co., 70 Ala. 268; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 15 S. E. 83; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989; Pittsburgh etc. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849; McKinley v. Chicago etc. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Williams v. Pullman Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 South. 631; Baltimore etc. Ry. Co. v. Blocher, 27 Md. 277; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Richberger v. American Exp. Co., 73 Miss. 161, 55 Am. St. Rep. 522, 18 South. 922; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; Dupre v. Childs, 52 App. Div. 306, 65 N. Y. Supp. 179; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Nelson Business College Co. v. Lloyd, 60 Ohio St. 448, 71 Am. St. Rep. 729, 54 N. E. 471; Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; Luttrell v. Hazen, 3 Sneed, 20; Bess v. Chesapeake etc. Ry. Co., 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234; Bryan v. Adler, 97

Wis. 124, 65 Am. St. Rep. 99, 72 N. W. 368; Craker v. Chicago etc. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504; Limpus etc. General Omnibus Co., 1 Hurl. & C. 528.

f. **Must be in Execution of Employment.**—Where an agent steps aside from the performance of the business for which he was employed by his principal and embarks upon a matter of his own, the principal is not liable for the consequences of the agent's act while so engaged. If, while engaged in executing the employment of his principal, he so conducts himself, whether negligently or maliciously, as to injure another, his principal will be liable. If, however, he forsakes such employment and purely for his own benefit, or to gratify some personal hate, does an act unconnected with the service of his principal, the latter is not responsible for its consequences. The agent may, immediately after the commission of the act, resume the performance of the duties of his agency, and in the commission of the tort may have employed the instrumentalities furnished by the principal for the proper performance of his duties. As to the act itself, however, the doctrine of respondeat superior is inapplicable, and no liability therefor can attach to the principal. Instances of the application of this rule are all but innumerable, and are quite freely given in the monographic notes to Goodloe v. Memphis etc. R. Co., 54 Am. St. Rep. 71-93, and Ware v. Barataria etc. Canal Co., 35 Am. Dec. 192-201. The result of the cases is generally that the liability of the principal depends upon whether or not the act of his employé was done for the purpose of executing his agency, or was done wholly for a purpose of his own, disregarding the object of his employment—on "his own frolic," as it is put. In the former case the principal is liable; in the latter he is not: See, generally, in this connection, Gilliam v. South etc. Ry. Co., 70 Ala. 268; Stephenson v. Southern Pac. Ry. Co., 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635; Ritchie v. Walls, 63 Conn. 155, 38 Am. St. Rep. 361, 28 Atl. 29; Chicago etc. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Callahan v. Hyland, 59 Ill. App. 347; Evansville etc. R. Co. v. Baum, 26 Ind. 70; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 South. 631; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; McGilvray v. West End St. Ry. Co., 164 Mass. 122, 41 N. E. 116; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; Morier v. St. Paul etc. Ry. Co., 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; Steinback v. Friedman, 50 N. Y. Supp. 1025, 23 Misc. Rep. 173; Cantrell v. Colwell, 3 Head (40 Tenn.), 471; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753, 11 S. W. 139; Thome v. Heard, [1895] App. Cas. 495; Storey v. Ashton, L. R. 4 Q. B. 476; Stevens v. Woodward, 6 Q. B. Div. 318; British Mut. Banking Co. v. Charnwood Forest Ry., 18 Q. B. Div. 714, 56 L. J. Q. B. 449; Croft v. Alison, 4 Barn. & Ald. 590.

g. Instances of Liability.

1. Malicious Prosecution, etc.—A class of cases of not infrequent occurrence is that in which a principal is sought to be held for the unwarranted arrest or prosecution by his agent of the party complaining for an act in some way connected with the property of the principal. Here, as in other cases, the question of liability depends upon whether or not the arrest or prosecution was within the scope of the employment of the agent. If the agent is employed as a police officer by the principal, his duty being to make arrests when proper, the latter is undoubtedly liable if in a particular case the arrest is unwarranted. The act is then within the scope of his employment: Goff v. Great Northern Ry. Co., 3 El. & E. 672, 30 L. J. Q. B. 148; Edwards v. Midland Ry., 50 L. J. Q. B. 281, 6 Q. B. Div. 287. In Govoski v. Downey, 100 Mich. 429, 59 N. W. 167, the agent of the defendant railroad company is called a "detective," but the company was held not liable for a malicious prosecution by this employé, on the ground that it was not shown that the arrest had been made by him in the line of his duty to the company.

Ordinarily, however, the arrest or criminal prosecution of an offender, even where the offense was against the property of the principal, is not within the scope of an agent's employment. "In doing such act the agent acts in response to his duty as a citizen to see that public justice is done by punishing the offender. He by such an act does not, in theory of law, seek to punish the supposed thief because he has wronged the company, but because he has wronged the state": Cameron v. Pacific Express Co., 48 Mo. App. 99. To the same effect, see Daily v. Young, 3 Ill. App. 39; Hancock v. Singer Mfg. Co., 174 Ill. 503, 51 N. E. 820, affirming Singer Mfg. Co. v. Hancock, 74 Ill. App. 556; Baltimore etc. Turnpike Road v. Green, 86 Md. 161, 37 Atl. 642; Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615; Larson v. Fidelity Mut. L. Assn., 71 Minn. 101, 73 N. W. 711; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Mulligan v. New York etc. Ry. Co., 129 N. Y. 506, 26 Am. St. Rep. 539, 29 N. E. 952; Murrey v. Kelso, 10 Wash. 47, 38 Pac. 879; Bank of New South Wales v. Owston, 4 App. Cas. 270, 48 L. J. P. C. 25.

A distinction is to be made in this connection between those cases in which the action of the agent could have no effect other than the punishment of the offender, and those in which the arrest or prosecution was made with a view to the recovery of the principal's property or the protection of his business. As said by Mr. Justice Blackburn in Allen v. London etc. R. Co., L. R. 6 Q. B. 65: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the

offender for that which has already been done." Accordingly, where the arrest and detention of the plaintiff was incidental to a replevin suit for the recovery of the property of the principal the latter is liable: Wheeler and Wilson Mfg. Co. v. Bryce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609. So, where the arrest was made in order to procure payment of a debt which the agent believes to be owed to his principal, the latter is responsible for the act of his employé: Dupre v. Childs, 52 App. Div. 306, 65 N. Y. Supp. 179; Palmer v. Manhattan Ry. Co., 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001. And see Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Cameron v. Pacific Exp. Co., 48 Mo. App. 99; Gulf etc. Ry. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744. See, generally, on liability of principal for malicious prosecution, etc., by agent, Goodspeed v. East etc. Bank, 22 Conn. 530, 58 Am. Dec. 438; Cleveland etc. Co. v. Koch, 37 Ill. App. 595; Springfield Engine etc. Co. v. Green, 25 Ill. App. 106; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615, and cases cited; Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

2. Libel.—So a principal is responsible for a libel published by his agent within the scope of the latter's employment: Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Howe Machine Co. v. Souder, 58 Ga. 64; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985. In the case last cited a station agent transmitted by telegraph a libelous message over the wires of his principal, the telegraph company, and the latter was held responsible, the court saying: "He was acting in the capacity for which he was employed, and having this power, he was acting within the scope of his authority. He did not perform the act for his own purpose, but for that of the master who employed him, and for the master's benefit. That he abused the authority is no defense in such case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault." In Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580, it was held not to be within the scope of the duties of a fire insurance agent to furnish the public generally with information as to the purposes for which certain buildings were occupied. The insurance company was therefore held not liable for the act of such agent in disclosing the contents of a document containing such information, furnished him by his principal, to assist in the regulation of rates of fire insurance: See, also, Philadelphia etc. R. Co. v. Quigley, 21 How. 202; Washington etc. Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. Rep. 296; Harding v. Greening, 8 Taunt. 42.

3. Fraud.—It was held in a few of the earlier cases that a principal was not liable in deceit for the fraud of his agent, in the absence of proof that he participated in the fraud: Wachsmuth v. Martini, 45 Ill. App. 244; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581; Freyer v. McCord, 165 Pa. St. 539, 30 Atl. 1024;

Udell v. Atherton, 7 Hurl. & N. 172, 30 L. J. Ex. 337. The liability of a principal in this connection is, however, now well settled. As said by Mr. Justice Willes in Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, 36 L. J. Ex. 147: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved": Morton v. Scull, 23 Ark. 289; Wheeler v. Baars, 33 Fla. 696, 15 South. 584; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Lutz v. Forbes, 13 La. Ann. 609; Laum v. Port Deposit etc. Assn., 49 Md. 233, 33 Am. Rep. 246; Locke v. Stearns, 12 Mass. (1 Met.) 560, 35 Am. Dec. 382; White v. Sawyer, 82 Mass. (16 Gray) 586; Fifth Avenue Bank v. Forty-second Street etc. R. R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378; Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678; City Nat. Bank v. Dun, 51 Fed. 160; Barwick v. English Joint Stock Bank, 36 L. J. Ex. 147, L. R. 2 Ex. 259; Kern v. Nichols, 1 Salk. 289; Mackay v. Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31.

In order, however, that the fraud of the agent shall render his principal liable, the acts done or statements made by the agent must have been within the scope of his employment. An ordinary clerk in a store does not, it is held, act within the scope of his employment in making statements to a mercantile agency as to the financial standing of his employer: Wakefield Rattan Co. v. Tappen, 80 Hun, 219, 30 N. Y. Supp. 38. And similar statements as to the financial standing of a company were held in Barnett v. South London etc. Co., 18 Q. B. Div. 815, 56 L. J. Q. B. 452, not to be within the range of the employment of the company's secretary: See, also, Daley v. Quick, 99 Cal. 179, 33 Pac. 859; Executors of Luse v. Parke, 17 N. J. Eq. 415; Bank of Palo Alto v. Pacific Postal Tel. etc. Co., 103 Fed. 841; Sternback v. Friedman, 23 Misc. Rep. 173, 50 N. Y. Supp. 1025; Thorne v. Heard, [1895] App. Cas. 495. For the liability of a principal for the misrepresentations of his agent, see monographic note to Henry v. Dennis, 85 Am. St. Rep. 372.

4. Assault and Battery.

A. General Rule.—The principle determining the liability of a principal for an assault by his agent is that which forms the test of his liability in the case of other torts. If the assault was committed by the agent in the execution of his employment, and for no purpose of his own, the principal is liable. If, however, the act was one independent and outside of the scope of his employment, but for some private purpose of the agent, the doctrine of

respondeat superior is inapplicable and the party injured will have recourse against the agent alone.

Where, therefore, an agent is employed in a service involving a possibility that it will be necessary to use force in its execution, if the agent in the course of performing such agency uses excessive force, the principal will be liable therefor. The act being within the scope of the agent's employment and done in the execution of it, it is immaterial that he has abused the authority conferred upon him by the use of unnecessary and excessive violence: St. Louis etc. Ry. Co. v. Dalby, 19 Ill. 353; Carter v. Louisville etc. Ry. Co., 98 Ind. 552, 49 Am. Rep. 780; Hewitt v. Swift, 3 Allen, 420; Holmes v. Wakefield, 94 Mass. (12 Allen) 580, 90 Am. Dec. 171; Moore v. Fitchburg R. R. Co., 70 Mass. (4 Gray) 465, 64 Am. Dec. 83; Ramsden v. Boston etc. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Rounds v. Delaware etc. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Hoffman v. New York Cent. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; McClung v. Dearborne, 134 Pa. St. 396, 19 Am. St. Rep. 708, 19 Atl. 698.

Where, however, the assault by the agent is unconnected with the performance of his duties, the principal is not liable therefor, even although the occasion for the assault may have arisen in a matter connected with the agency. Thus, in Williams v. Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 South. 631, a person entering one of the cars of the defendant to ask the privilege of washing his hands was wantonly and without provocation assaulted by the porter of the car. The defendant company was, however, held not responsible for the injury, the court saying: "A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment, but if on such presentment the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with the clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Clearly, in all such cases, the lawfulness of the party's conduct, and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant." To the same effect, see Gilliam v. South etc. R. Co., 70 Ala. 268; Stephenson v. Southern Pac. Co., 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234; Callahan v. Hyland, 59 Ill. App. 347; Evansville R. Co. v. Baum, 26 Ind. 70; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; Ware v. Bardataria etc. Canal Co., 15 La. 169, 35 Am. Dec. 189, and note; Central Ry. Co. v. Peacock, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; Rounds v. Delaware etc. Co., 64 N. Y. 129, 21 Am. Rep. 597; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

B. **By Agents of Carriers.**—If, therefore, the principal is under no obligation to the party injured than that which may arise from the operation of the doctrine of respondeat superior, he will not be liable for an assault by the servant outside the scope of his employment. In the case of public carriers, however, the principal owes to passengers the duty of protecting them from the assaults or willful wrongs of his servants or agents, and if the subject of an assault by an agent of the carrier be a passenger on the train of the latter, it is no answer to reply that the act was outside the scope of his employment. As to strangers, the duty of a carrier is that of any other principal—he is liable only when, in committing the assault his agent was acting in the course of his employment. One of the implied provisions of a contract of carriage, however, is that the carrier will protect the passenger from the assaults of his servants or other passengers. The distinction is well brought out by a comparison of Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 South. 631, and the case bearing the same title reported in 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 South. 85. In the former, the Pullman Palace Car Company was held not liable for wanton assault by a porter in its employ on a person who not having a berth in the sleeping-car had no contractual relation with the company. In the latter case the railroad company was held liable for the same assault, the plaintiff having been a passenger on its train: See in this connection the monographic notes to Richmond etc. R. R. Co. v. Jefferson, 32 Am. St. Rep. 90-101; Ware v. Barataria etc. Canal Co., 35 Am. Dec. 201; and to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 89; and the cases of Savannah etc. Ry. Co. v. Quo, 103 Ga. 125, 68 Am. St. Rep. 85, 29 S. E. 607; Haver v. Central R. R. Co., 62 N. J. L. 282, 72 Am. St. Rep. 647, 41 Atl. 916; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243; Bess v. Chesapeake etc. Ry. Co., 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234.

III. Criminally.

a. **General Rule.**—The general rule undoubtedly is that a principal is not responsible criminally for the unauthorized acts of his agent. As is said in Anderson v. State, 22 Ohio St. 305: "Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense are either principals or accessaries. In offenses less than felony all are principals. But where it in fact appears that the person accused in no way participated in the commission of the criminal act, he ought not, by construction, to be made responsible for it." In order to render the principal liable criminally for the crime of his agent, it must therefore appear either that it was committed by his authority, express or necessarily implied, or else that he has in some way participated in, countenanced, or approved its commission. "As to

civil liability, a broader and more general principle of responsibility applies, and the master or principal may be held to answer in damages for the default and misdoings with which he had no other connection than that which arises from the fact that the injury was occasioned by one employed in his service. As a general rule, something beyond this is necessary to charge the master criminally for acts done by his servant. There must be such a direct participation in the act, or such assent and concurrence therein as would involve him morally in the guilt of the action": Commonwealth v. Nichols, 10 Met. 259, 43 Am. Dec. 432. To the same effect, see Patterson v. State, 21 Ala. 571; Noll v. State, 34 Ala. 262; Seibert v. State, 40 Ala. 60; Cushing v. Dill, 3 Ill. (2 Scam.) 460; Satterfield v. Western Union Tel. Co., 23 Ill. App. 446; Hipp v. State, 5 Blackf. 149, 33 Am. Dec. 463; Commonwealth v. Brian, 142 Mass. 463, 56 Am. Rep. 707, 8 N. E. 338; Commonwealth v. Stevenson, 142 Mass. 466, 8 N. E. 341; Commonwealth v. Hayes, 145 Mass. 289, 295, 14 N. E. 151; People v. Parks, 49 Mich. 333, 13 N. W. 618; Anderson v. State, 22 Ohio St. 305; Commonwealth v. Johnston, 2 Pa. Sup. Ct. 317; Mitchell v. Mines, 8 Tex. 6; State v. Bacon, 40 Vt. 456; Queen v. Holbrook, L. R. 3 Q. B. Div. 60; Somerset v. Hart, L. R. 12 Q. B. Div. 360; Rex v. Huggins, 2 Strange, 882.

b. **Act of Agent in Violation of Principal's Instructions.**—A principal is not, therefore, responsible criminally for an act of his agent in opposition to his will and against his orders: Barnes v. State, 19 Conn. 398; Commonwealth v. Wachendorf, 141 Mass. 270, 4 N. E. 817; Commonwealth v. Stevens, 153 Mass. 421, 25 Am. St. Rep. 647, 26 N. E. 992; Commonwealth v. Junkin, 170 Pa. St. 197, 32 Atl. 410; State v. Smith, 10 R. I. 258; Police Commrs. v. Cartman (1896), 1 Q. B. 655. And while, as is said in Anderson v. State, 22 Ohio St. 305, such directions or instructions must be in good faith, and not merely colorable, they will be presumed to be so until the contrary is proved; yet "every lawful instruction from principal to agent is to be considered as given in good faith until the contrary is shown, and then the bona fides of the instruction is for the jury. Under no other rule can the rights of honest men be preserved, and they are entitled to invoke this rule, notwithstanding the fact that some dishonest men may perchance escape just punishment under its shield": Commonwealth v. Johnston, 2 Pa. Sup. Ct. 317.

c. **Exceptions to General Rule.**—A class of cases said to form exceptions to the general rules above laid down are those relating to the responsibility, criminally, of a principal for the libels, maintenance of public nuisances, and violations of revenue and police regulations. As to these, it is asserted the principal may be convicted in the absence of proof that he authorized the commission of the crimes, and even in the face of proof that he forbade them. These exceptions are, however, it is believed, more apparent than real.

Whatever may have been the effect of the older cases upon the criminal responsibility of a principal for the libels of his agent (see Rex v. Gutch, 1 M. & M. 437; Rex v. Walter, 3 Esp. 21; Rex v. Almon, 5 Burr. 2688), the rule in England to-day would seem to be that obtaining in the other cases: Queen v. Holbrook, L. R. 4 Q. B. Div. 42. Rex v. Dixon, 3 Maule & S. 11, is the case most frequently cited as establishing the exception to the general rule with respect to police regulations. This was an indictment charging the defendant with the violation of a statute forbidding the use of alum in the making of the bread. The case was left to the jury to say whether the defendant knew of the alum being mixed in the bread by his servant, and the jury found him guilty. The case therefore goes no further than to hold a principal liable in such case where his acquiescence in the agent's conduct is shown.

Attorney General v. Siddon, 1 Cromp. & J. 220, was an action for a penalty for a violation of a customs regulation by the defendant's servant, and was distinguished by Alexander, L. C. B., and by Bayley, B., on the ground that the proceeding was not criminal, but penal.

As to the liability of a principal to indictment for the maintenance of a public nuisance by his agent, the leading case is Queen v. Stephens, L. R. 1 Q. B. 702. Here again, however, the distinction was taken between a proceeding in form criminal but in substance civil, and a purely criminal prosecution; the indictment in such case was held to be of the former character, and Blackburn, J., expressly denied that the effect of the holding the principal liable was in any way to infringe the general rule that the principal is not criminally answerable for the unauthorized acts of his agents.

The same distinction between a penal and a criminal action as is taken in the two cases last cited is recognized in Truchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146, which was an action for a penalty for a refusal by an innkeeper to receive a negro as a guest. The court said: "Nor can there be anything in the objection that as this is a penal statute, the violation cannot occur through an agent, such as the manager or clerk of a hotel acting for the proprietor or owner. The rule contended for is applicable to criminal cases only, and cannot be invoked in a civil action, though such action be based upon a penal statute. The rule in such cases is the same as in other cases where the relation of master and servant exists. The master is responsible for the acts of his servant in the course of his master's business": See, also, Bryan v. Adler, 97 Wis. 124, 65 Am. St. Rep. 99, 72 N. W. 368.

For the liability criminally of a principal for the sale of intoxicating liquors by his agent, see State v. Kittelle, 28 Am. St. Rep. 698, and note.

HARVEY v. SUSQUEHANNA COAL COMPANY.

[201 Pa. St. 63, 50 Atl. 770.]

MINES AND MINING—PREPARATION OF COAL FOR MARKET—CARE REQUIRED.—A coal company in preparing its coal for market by means of an artificial breaker must exercise due care in protecting the property of adjoining owners or others, by controlling, as far as possible, through the most effective known means, the dust generated in breaking and separating the coal. If the company exercises such care, it is not liable for the injury inflicted by escaping dust. (p. 802.)

MINES AND MINING—ESCAPE OF COAL DUST—EVIDENCE.—A witness who has actually examined a coal-breaker and premises, and inspected the means employed to prevent the escape of coal dust, may testify to the existing conditions in an action to recover damages for injury arising from the alleged negligent escape of such coal dust. (p. 803.)

NUISANCE FROM MINING.—MEASURE OF DAMAGES to property caused by the negligent escape of coal dust from a breaker is the cost of restoring the premises to their condition before they were injured, unless such cost equals or exceeds their value, in which event the value of the premises is the measure of damage, and in either case the actual loss in rentals due to the injury of the premises should be added. (pp. 803, 804.)

MINES AND MINING—NEGLIGENT ESCAPE OF COAL DUST—ERRONEOUS INSTRUCTIONS.—In an action to recover for injury to property caused by the negligent escape of coal dust, it is error to instruct the jury that the defendant is liable, if by any other device than the one employed he could have prevented the injury, as such instruction authorizes the jury to find that some other device could have been adopted, and gives it a license to invent one, and to find defendant negligent in not having himself invented and used one like it, while his duty was only to use the most effective and approved appliances known to control the escape of dust. (p. 804.)

F. E. Wheaton, A. L. Williams, and H. W. Palmer, for the appellant.

J. T. Lenahan and E. A. Lynch, for the appellee.

66 BROWN, J. The contention of the appellant is that the injury of which the appellees complain is damnum absque injuria, and Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453, and Pennsylvania R. R. Co. v. Lippincott, 116 Pa. St. 472, 2 Am. St. Rep. 618, 9 Atl. 871, are relied upon for its immunity from liability. In the former case the injury to the plaintiff resulted from the defendants' natural and lawful use of the land itself. They imposed nothing upon the plaintiff that she was not bound to bear as a servient owner, and the following words of the late Justice Clark

sufficiently distinguish it from the present case: "It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing onto the land artificially. The water as it is poured into Meadow brook is the water which the mine naturally discharges; its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it." This same case was held to be "not at all in point" in Hindson v. Markle, 171 Pa. St. 138, 33 Atl. 74, where it was decided that the owner of coal mines may deposit refuse and culm upon his own land, and if the [67] same are carried away by extraordinary floods into a stream which runs through the land of a lower owner, spreading thence over such lower land, the owner of the coal land is not responsible in damages to the lower owner for the injury thus sustained; but if the refuse is placed on his own land, in a position where it is washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner, the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner. Referring to the Sanderson case and its inapplicability, the late Chief Justice Green said: "That was the mere flowage of natural water which was discharged by natural and irresistible forces necessarily developed in the act of mining, prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use." In Pennsylvania R. R. Co. v. Lippincott, 116 Pa. St. 472, 2 Am. St. Rep. 618, 9 Atl. 871, the other case upon which the appellant seems to rely, where it was held that a lawful erection by the railroad company on its own ground, and the lawful use of the same, were not the subject of damage to the adjoining land owners, it was also distinctly ruled that, if the Pennsylvania Railroad Company had been guilty of a nuisance, and if, in the use of its road, it had made more smoke or dust than was lawfully allowable in the working of its machinery, and the plaintiffs had been thereby injured, they had a remedy.

In the case before us there is no complaint by the appellees that the business of the appellant is not lawful, or that it is do-

ing anything beyond its corporate powers and privileges, causing them loss. No damages are claimed for injury resulting from the business itself in which the coal company is engaged, or from the natural and lawful use which it is making of its land in mining its coal, and compensation is not sought for the depreciation of the value of property occasioned to the owner of lower land from natural causes existing on that of an upper owner. The complaint is, that after the coal is taken from the land and brought to the surface, the coal company, in its artificial breaking, separation and preparation of the same for the market, has been negligent in not controlling the large quantity [68] of dust necessarily created in so breaking, separating and preparing the coal, and that through its negligence in failing to so control the dust it has been borne by the winds to and upon the properties of the appellees, resulting in the very serious injury set forth in the statement of their cause of action and testified to by their witnesses. The appellant has the right not only to mine its coal, but to prepare it for the market. In so preparing it by artificial means volumes of dust necessarily arise, which, if not controlled as far as possible by proper appliances and the exercise of proper care, will be borne and scattered by the winds over and upon adjoining and nearby properties, and injuries to the same must result. If such injuries can be avoided by the most effective and approved means known of controlling coal dust, it is the duty of the appellant to adopt them. The maxim, "Sic utere tuo ut alienum non laedas," as applied to this coal company, does not mean that it cannot prepare its coal for market, but that, in so preparing the same, due regard must be had for the rights of others by controlling, as far as possible, through the most effective known means, the dust generated in breaking and separating the coal. The jury were properly instructed by the learned trial judge when he said: "The defendants, in the preparation of the coal, are engaged in a lawful business. The injury of which the plaintiffs complain is not in the mining of the coal, but is because of the method of its preparation for the market upon defendant's land after it is mined. Parties can reasonably use their own lands, but they must so use them as not to do injury and damage to the property rights of their neighbors. When parties are engaged in a lawful business, in order to sustain an action for injury resulting therefrom, the injury must be shown to have been real and substantial, not a trifling annoyance or injury such as is necessarily incident to the business complained

of. There are some injuries too slight and exceptional to be recognized as a bar to the active industries of the country. Every lawful enterprise contributes to the public good. It furnishes employment to the idle, promotes every other branch of industry, and in this way directly benefits the whole community. It is not unreasonable that the individual members of the community thus benefited should make some slight sacrifices for the public welfare. There can be no recovery in a case of [69] this kind based upon the theory that it is not pleasant or conducive to the plaintiffs' feelings to have this breaker in proximity to their property. There can only be a recovery upon the principle of the negligence of the defendants, and as a result of such negligence the plaintiffs have sustained more than a trifling injury; that they have sustained a substantial injury to their property rights. Has the defendant been careless in the preparation of the coal in breaker No. 5?" The appellees allege that the appellant did not properly control the dust, but adopted and used defective and inadequate appliances; and, as there was proof submitted in support of this allegation, it was not for the court to say that the injury of which they complain was damnum absque injuria, but it was for the jury to determine whether it resulted from negligence, for the consequences of which the appellant is liable. The fifth, sixth, seventh, eighth, and ninth specifications of error are, therefore, overruled.

That portion of the testimony of W. F. Dodge which related, not to what he had seen, but to what had been reported to him, having been stricken out by the court, the appellant was not harmed by it. As to the rest of his testimony, no valid objection can be made. From views of the breaker and premises, and from actual inspection and examination of the means adopted to control the dust, which, according to the testimony of appellant's own witnesses, were no worse, and perhaps better, at the time he saw them than during the six years preceding the institution of this suit, he had qualified himself to speak, and the first assignment is not sustained.

The true measure of damages in this case, if the appellant's negligence caused the injury to appellees' properties, is, first, the cost of restoring them to their condition before they were injured, unless such cost equal or exceed their value, in which event the value is the measure of damages: Lentz v. Carnegie Bros. & Co., 145 Pa. St. 612, 27 Am. St. Rep. 717, 23 Atl. 219; Eshleman v. Martic Township, 152 Pa. St. 68, 25 Atl. 178;

and to this cost of restoration should be added the actual loss in rentals due to the injury to the premises. If the appellees ought to recover, no other measure can give them just compensation, for if they have been wronged by the appellant, they are clearly entitled not only to a restoration of their properties to their former condition, but for damages as well by being deprived of the use of them. As the case must go back [70] for another trial, for a reason about to be given, and the measure of damages just indicated will be observed, nothing more need be said as to the second, third, fourth and eleventh assignments.

When the court, in charging the jury, asked, "Could the defendant by any other device than the one that it has in use there have prevented the injury to plaintiffs' property?" too high a standard of care was set up for the appellant in the conduct of its lawful business. Its duty was to use the most effective and approved known appliances to control the dust; and, if some of it should escape them and settle on adjoining properties with injurious results, no lack of care could be imputed to the company. Any damage would then be damnum absque injuria; but to intimate to the jury that they might find that some other device could have been adopted was to give them a license to invent one themselves in their room, and to find that the appellant was negligent in not having itself invented and used one like it. They were left to conjecture what might have been done to control the dust, and to their conjectures it can hardly be pretended that the coal company could have been safely committed. The tenth assignment of error is sustained, and the judgment reversed, with a venire facias de novo.

One may Use His Own Land for all purposes for which it is usually applied without being liable for consequential injuries to his neighbors, if he employs due skill and caution and no legal right is infringed. But his right to the use of his land is not absolute. It is qualified by the right of adjacent owners to the beneficial use and enjoyment of their property. If he goes beyond the limits of lawful use and creates a nuisance to his neighbors, he is liable without regard to negligence: See the note to Hay v. Cohoes Co., 51 Am. Dec. 282; Sullivan v. Durham, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923; Gulf etc. Ry. Co. v. Oakes, 94 Tex. 155, 86 Am. St. Rep. 835, 58 S. W. 999; Metzger v. Hochrein, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308.

Nuisances.— As to whether smoke, soot, cinders, and vapors amount to actionable nuisances, see St. Louis v. Heitzeberg Packing etc. Co., 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954; Garland v. Aurin, 103 Tenn. 555, 76 Am. St. Rep. 699, 53 S. W. 940; McMorran

v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; Euler v. Sullivan, 75 Md. 616, 32 Am. St. Rep. 420, 23 Atl. 845; Fort Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 570; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.

STEVENSON v. EBERVALE COAL COMPANY.

[201 Pa. St. 112, 50 Atl. 818.]

WATERS—POLLUTION.—MEASURE OF DAMAGES for the pollution of a stream is the cost of removing the polluting substance, unless such expense exceeds the value of the entire property, in which case the value of the property is the limit of the measure of damages. There can be no recovery in excess of the value of the property for the permanent injury. (p. 805.)

EVIDENCE.—OPINIONS of witnesses as to the annual depreciation of the value of property caused by the pollution of a stream are inadmissible in evidence, especially when they are mere reckless guesses based upon no facts whatever. (p. 805.)

EVIDENCE.—DECLARATIONS AGAINST HIS INTEREST made by a party to the record are always admissible in evidence, and, when the offer is to prove what he testified to in certain legal proceedings, it is an offer to prove conclusively what his admission was. (p. 806.)

WATERS — POLLUTION.—EVIDENCE that other causes than the alleged injury committed by the defendant contributed to the pollution of a stream and the impairment of the value of plaintiff's property, is admissible in an action to recover for the pollution of the stream. (p. 806.)

WATERS—POLLUTION—EVIDENCE TO MITIGATE DAMAGES.—If a person has the right to use the waters of a stream as it naturally flows over his property, private persons polluting it cannot urge, in mitigation of the damages caused by them, that they offered to give him a substitute for it. The right to decline arbitrarily the use of any other water offered is as absolute as the right to use the unpolluted water. (pp. 807, 808.)

WATERS — POLLUTION. — EVIDENCE OF THE REAL VALUE of the property injured is admissible in an action to recover for the pollution of a stream. (p. 808.)

WATERS—POLLUTION—EVIDENCE.—In an action to recover for the pollution of the waters of a stream used to operate a wool factory, declarations of the plaintiff that it was difficult to do business because of the scarcity of wool, inability to get skilled labor, and because the machinery and the plaintiff are both old, are admissible in evidence, both as tending to show the real value of the property injured and whether its impaired value was due entirely to injury caused by the defendant. (p. 808.)

S. P. Wolverton, H. W. Palmer, A. H. McClintock, P. V. Weaver, and T. W. Wheaton, for the appellants.

J. M. Garman and J. T. Lenahan, for the appellee.

[121] BROWN, J. The real complaint of the appellants is that the verdict is excessive. The only reason assigned in the application for a new trial in the court below was, that the damages assessed by the jury were too high, and, by the twenty-seventh and last assignment of error, which is not sustained, we are asked to reverse or modify the judgment for the same reason. We are urged not to remit the case for another trial, but, under the power conferred by the act of May 20, 1891 (Pub. Laws, 101), to reduce the verdict to such a sum as, in our judgment, under the testimony, will be right and proper. This we are at present unwilling to do, being of one mind that a jury, properly directed by the court as to the measure of damages, after hearing competent testimony, will return a just finding; and, as we are compelled to sustain some of the assignments of error, on a new trial there may be a verdict which will not be regarded as unreasonable.

The tenth point submitted by the defendants was as follows: "If the jury find the plaintiff is entitled to recover, the true measure of damages for permanent injury in this case is the cost of removing the culm or coal dirt, unless the expense of removal of the coal dirt exceeds the value of the entire property, in which case the value of the property is the limit of the measure of damages, and in no event can there be a recovery in excess of the value of the entire property for a permanent injury." This point was properly affirmed: Lentz v. Carnegie Bros. & Co., 145 Pa. St. 612, 27 Am. St. Rep. 717, 23 Atl. 219; Eshleman v. Martic Township, 152 Pa. St. 68, 25 Atl. 178; Elder v. Lykens Valley Coal Co., 157 Pa. St. 490, 37 Am. St. Rep. 742, 27 Atl. 545; but testimony was admitted by the court from which the jury could have arrived at another measure of damages. Sons of the plaintiff were allowed to testify to the depreciation of the value of their father's property from 1890 until the day of the trial, due to the pollution of his stream by the defendants, and they fixed the annual depreciation at ten thousand dollars, or a total of one hundred thousand dollars for [122] ten years. The question of depreciation of the value of the property was not properly before the jury; but even if it had been, the opinions of these witnesses were reckless guesses, based upon no facts, and ought not to have been allowed to go to the jury, who may have been improperly and unduly influenced by them. These witnesses should have been examined on the question of damages from

the standpoint of the tenth point submitted by the defendants, and the first and second assignments of error are sustained.

By agreement, the jury were instructed that they could return a verdict against one or all of the defendants as joint tort feasors, and the offer of the testimony of John Markle, taken in the case of John Geddig v. The Union Improvement Company, and the Jeddo Tunnel Company, Limited, was simply an offer to prove conclusively certain admissions that he had made. The testimony was admitted to affect only the witness who, at the time he testified, was president and chief engineer of the Jeddo Tunnel Company, Limited, which company is one of the defendants in this suit. The declarations of a party to the record, if against his interest, are always admissible, and when the offer is to prove what he testified to in certain proceedings at law, it is an offer to prove conclusively what his admission was. Ordinarily, admissions as matters of proof are uncertain and generally liable to be contradicted; but when uttered words are taken down as testimony in a cause, there can be no mistake as to what the witness said, or as to what the admissions were. Markle was not a witness for the plaintiff, whom he ought to have subpoenaed, or whose testimony could be read only after proof to the court that the witness could not be produced; as stated, his deposition was offered and received as an admission of one of the defendants affecting only himself, and the cases brought to our notice as to the right to read the deposition of a witness do not apply. Markle's deposition was properly received, and the third and fourth assignments are not sustained.

The offers which are the subjects of the fifth, sixth, seventh, eighth, ninth, sixteenth, seventeenth, and eighteenth assignments were made for the purpose of showing that there were other causes than the alleged injuries committed by the defendants that contributed to the impairment of the value of plaintiff's property and all should have been allowed. These assignments are sustained.

123 There was no error in rejecting the offer to prove that the Nescopeck Water Supply Company would agree to supply fresh water to the plaintiff at the rate of fifteen dollars per annum, in an amount sufficient to wash the wool in his factory. He had the right to use the water of Nescopeck creek as it naturally flowed over his own property, and private parties polluting it cannot urge, in mitigation of the damages they cause, that they offered to give him a substitute for it. The right to arbitrarily decline the use of any other water proffered by the defendants

was as absolute as the right to use his own unpolluted water, and the tenth assignment is overruled.

As the measure of damages in this case is the expense of removing the coal dirt, unless the cost of such removal shall exceed the value of the entire property, the offers, which are the subject of the eleventh, thirteenth, fourteenth and fifteenth assignments should have been allowed, for the real value of the property becomes important. The witnesses called were clearly competent to testify what it was, and the exclusion of their testimony was error. These assignments are sustained.

The testimony of D. J. McCarthy that he had a conversation with the plaintiff, in which the latter stated that it was difficult to do business because of the scarcity of wool; that the farmers had practically quit raising it; that it was extremely difficult to get skilled labor, being remote from any town; that the machinery was old, and that he was old himself —ought not to have been stricken out, as it was most important upon the question, not only of the real value of the property, but as to whether its impaired value was due entirely to the injuries alleged to have been done by the defendants. The nineteenth assignment is sustained.

The twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth assignments are overruled. They all challenge the correctness of the charge of the trial judge and his answers to points submitted by the defendants, which are entirely free from error.

It is not needful that we say anything more. After the admission of the defendants of their liability to the plaintiff, the only question is the amount of damages that ought to be recovered. No errors were committed on the trial except those to which we have called attention. They will be avoided on a 124 second trial, and the jury will, in all probability, render a finding to which there will be no exception.

Judgment reversed and a venire facias de novo awarded.

The Pollution of Waters by municipal corporations is considered in the monographic note to Winchell v. Waukesha, 84 Am. St. Rep. 908-926. Every owner of land through which a stream flows is entitled to its reasonable use, including the right of drainage, though such drainage corrupts the waters: Valparaiso v. Hagen, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062; Platt v. Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. That the discharge of impure water in a stream may constitute a nuisance or create a right of action as to riparian owners, see Trevett v. Prison Assn., 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142; People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374;

North Point etc. Irr. Co. v. Utah etc. Canal Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168. The fact that a watercourse is already polluted does not entitle other persons to add thereto, nor preclude persons through whose lands it flows from obtaining relief against its further pollution: Barrett v. Mt. Greenwood etc. Assn., 159 Ill. 385, 50 Am. St. Rep. 168, 42 N. E. 891; Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167. If one riparian owner pollutes the water of a stream, the fact that others are using it in the same manner, instead of preventing relief, may require it: Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142.

REA v. EAGLE TRANSFER COMPANY.

[201 Pa. St. 273, 50 Atl. 764.]

LANDLORD AND TENANT—FORFEITURE OF LEASE—PLACE OF PAYMENT OF RENT.—A custom of the tenant to seek the landlord and pay the rent does not relieve the latter from the necessity of formal and legal demand for the payment of rent, made upon the leased land, if he seeks to make its nonpayment the basis for forfeiture of a lease, not stipulating any place where rent shall be paid. (p. 810.)

H. L. Castle, W. A. Stone, S. Stone, and W. E. Lineaweaver, for the appellant.

C. C. Dickey and G. and W. K. Shiras, for the appellee.

[275] MITCHELL, J. The opinion of the learned judge below and the argument here have taken a much wider range than the case calls for. Each party at the trial asked for binding instructions in his favor, and the judge accordingly directed a verdict for defendant. The correctness of this action is all that we need consider.

The action is ejectment to terminate a lease for nonpayment [276] of rent, and no place of payment being specially named it was incumbent on the plaintiff to show a demand on the land previous to the declaration of forfeiture. It is admitted that no such demand was made, and the plaintiff therefore failed in a part of his case essential to his right to recover. In McCormick v. Connell, 6 Serg. & R. 151, it was held that "where there is a condition of re-entry on nonpayment of rent, several things are required by the common law to be previously done, to entitle the reversioner to re-entry. There must be a demand of the precise rent due, on the very day on which it becomes due, on the most notorious place on the land, and a demand must in fact be made on the land, although there should be no person

on the land ready to pay it. This part of the common law has been adopted by us—is our own common law." I do not find that the law thus declared has ever before now been questioned so far as to require a citation by this court of that case in the eighty-one years since it was decided.

The plaintiff, however, relies on a course of dealing between the parties whereby the tenant was in the habit of bringing the rent to the lessor. This was not sufficient. It appears that the provisions of the lease had not been closely adhered to by the tenant and the preceding lessor, and plaintiff on acquiring the leased land had given the tenant notice that he would "hereafter insist strictly upon the terms of the lease." It also appeared that the real cause of plaintiff's dissatisfaction was not so much the want of punctual payment of the rent as other alleged breaches of the conditions of the lease. But as the case turns on the failure to demand the rent, these are not material.

While the law will enforce forfeitures within the strict terms of the contract between the parties, it will not go out of its straight path to aid them. Cases are numerous where rent has not been paid on the day, but has been accepted later without objection, so that a tenant has been led to believe that the strict time will not be insisted on, and equity has relieved against an attempted forfeiture. But no case in law and certainly none in equity has held that a custom for the tenant to seek the landlord and pay will relieve the latter from the necessity of formal and legal demand if he seeks to make nonpayment the basis of a forfeiture.

Judgment affirmed.

The Forfeiture of a Leasehold Interest is not implied nor favored in law: Williams v. Vanderbilt, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 476. And the right to declare the forfeiture of a lease may be waived: Moses v. Loomis, 156 Ill. 392, 47 Am. St. Rep. 194, and note, 40 N. E. 952. The lessor, in order to take advantage of a forfeiture, must elect to forfeit promptly, and do so by some positive act: Note to Guffy v. Hukill, 26 Am. St. Rep. 912. On relief in equity from forfeitures, see the monographic note to South Penn Oil Co. v. Edgell, 86 Am. St. Rep. 48-64.

SHIBLER v. HARTLEY.

[201 Pa. St. 286, 50 Atl. 950.]

FRAUDULENT CONVEYANCES—RIGHT TO PREFER CREDITORS.—A creditor may take a judgment, conveyance, or payment in any form to secure an actual debt, and the transaction is valid against other creditors, although he knows and intends that the effect will be to postpone them, and though he acts in aid of that intent as well as to protect himself. Such transaction cannot be impeached without a fraudulent intent, which cannot be inferred from the mere preference given, when there is in fact an actual debt. (p. 811.)

FRAUDULENT CONVEYANCES—PREFERENCE OF CREDITOR.—A debtor may lawfully prefer a creditor by any form of payment, and he may hasten the collection of the debt secured by judgment by confession, and by waiving inquisition, stay of execution, or appeal, either at the time the judgment is confessed or afterward. The fact that he receives a consideration therefor to enable the creditor to better secure or facilitate the collection of the claim is not alone a ground for the inference of fraud. (p. 812.)

FRAUD CANNOT BE DEDUCED or inferred from that which the law pronounces honest. (p. 812.)

R. H. Jackson, C. P. Lang, and D. R. Jones, for the appellant.

W. I. Craig, for the appellee.

287 FELL, J. We find nothing in the testimony to support an inference of fraud in fact or law. In a careful review of the subject of conveyances and preferences in fraud of creditors it was said by our brother Mitchell in Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737: "It may be considered as the established result of our cases that if a creditor takes a judgment, or conveyance, or payment in any form, to secure an actual debt, the transaction will be valid against other creditors, although he knew (1) that the effect would be to postpone the others; (2) that the debtor intended it to have that effect; and (3) although he took it to aid that intent as well as to protect himself. The criterion is not the effect, but the fraudulent intent. Without that the transaction cannot be impeached. A corollary of the foregoing rule is that where there is an actual debt the jury cannot be permitted to infer a fraudulent intent by the mere fact of payment or preference given." As a debtor may lawfully prefer a creditor by actual payment, or by the conveyance of property to him, or by the confession of judgment, it follows that he may hasten the collection of a

debt secured by judgment by waiving inquisition, or stay of execution, or the right of appeal. He could waive these rights when he confessed judgment, and he may waive them afterward to hasten the collection of a debt. The fact that he received a consideration for so doing, the purpose of the creditor being to better secure or to facilitate [288] the collection of a claim, is not, standing alone, a ground for the inference of fraud. "We are not permitted to assign a bad motive to an act which is not wrong in itself or in its necessary consequence": Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57. "A jury is not at liberty to deduce fraud from that which the law pronounces honest": York County Bank v. Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

The parties to the ejectment acquired their titles by sheriff's sales under judgments against C. W. Posey. The judgment on which the appellant's title was founded was prior in lien, and if valid their title was indefeasible. It was obtained by them in an action on a bond given by Henderson as principal and Posey as surety to secure the payment of the award of an arbitrator, selected to settle an account between Henderson and his copartners. The action was contested by both Henderson and Posey on the ground that the arbitrator after making an award of eighteen hundred dollars against Henderson had re-examined the accounts and altered the award to six thousand dollars. This defense was not considered good at the trial and a verdict was rendered against the defendants. Henderson appealed to this court and the judgment entered on the verdict was reversed. After a new trial in the common pleas had been refused and within the time for an appeal, Posey's real estate was levied on under an execution issued on a judgment confessed to Hayes, and advertised for sale by the sheriff, but the writ was subsequently stayed as to the property now in dispute. Two days before the sale was to take place, the appellants proposed to Posey that if he would waive his right to appeal, they would pay him one thousand dollars if they realized by the sale the full amount of their judgment, and in the event of their being compelled, for their own protection, to purchase to pay this amount less the interest on mortgage and taxes then due. This offer was accepted. Six weeks later, when the appellants desired to sell under their own judgment, they agreed that if Posey would waive the right of inquisition and condemnation so that the sale could be made without delay, they would, if they became purchasers, recon-

vey to him on the payment of their judgment less one thousand dollars within one year.

These were lawful agreements and not in their effect necessarily prejudicial to other creditors. The waivers might have 289 been incorporated in the agreement sued on, and there is no reason why they should not have been made after judgment was obtained. The first was of advantage to the appellants, as it enabled them, if a sale was made under the Hayes writ, to use their judgment at once in settlement with the sheriff if they became purchasers or to collect it if they did not; the second avoided delay and expense. The only ground for the contention that there was an intention to hinder, delay or defraud creditors is that the appellants knew that their judgment was invalid. This ground is wholly untenable. There is not a word in the testimony to suggest such an intent, nor a circumstance established from which it could be inferred. They had after a trial, contested at every point, obtained a judgment. How can a jury be permitted to find that because they paid the defendant to waive his right to the delays which the law gives him and to end the litigation at once, they knew their judgment was invalid, and acted with an intent to defraud other creditors? There was a proper and legal reason for their conduct—their desire to make their judgment immediately available. This is the only reason testified to, and their conduct was entirely consistent with it, and there was no ground for finding any other.

The first assignment of error is sustained and the judgment is reversed.

Fraudulent Conveyance.—A debtor in failing circumstances may prefer one creditor to the exclusion of others, provided the payment is made in good faith to discharge or secure the preferred claim. The fact that the debtor knows that the effect of the transaction, to the extent of such preference, is to hinder and delay other creditors is immaterial: Nelson v. Leiter, 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851; German Ins. Co. v. Bartlett, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075; monographic note to State v. Mason, 34 Am. St. Rep. 396, 397. But see Henney Buggy Co. v. Ashenfelter, 60 Neb. 1, 83 Am. St. Rep. 503, 82 N. W. 118. The preference may be in the form of a judgment or a confession of judgment: Snayberger v. Fahl, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1065; Sloan v. Hunter, 56 S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658. But see Walton v. First Nat. Bank, 13 Colo. 265, 16 Am. St. Rep. 200, 20 Pac. 440; Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142.

McCRACKEN v. CONSOLIDATED TRACTION CO.

[201 Pa. St. 378, 50 Atl. 830.]

NEGLIGENCE—WHEN QUESTION OF FACT.—If the defendant's negligence is shown but there is doubt as to the contributory negligence of the plaintiff the question of his negligence should be submitted to the jury. (p. 815.)

NEGLIGENCE—RAILROADS—RIGHT TO TRACK.—The dominant right to a railroad track is in the company owning it, and must be conceded and deferred to by all of the public who have a right to cross it, and when about to cross they must use ordinary prudence to ascertain whether the owner is about to use it. (p. 815.)

NEGLIGENCE—BICYCLISTS—STREET RAILWAYS.—It is the duty of a bicycle rider about to cross a street railway track to look and listen as he approaches, and his failure to do so is negligence per se. This is an unbending rule, to be observed at all times, and under all circumstances. (pp. 815, 816.)

NEGLIGENCE, CONTRIBUTORY—BICYCLISTS—STREET RAILWAYS.—A bicycle rider struck by a car of a street railroad as he attempts to cross the track cannot relieve himself of contributory negligence by showing the unlawful rate of speed of the car, if it was within his view just before he reached the track, and it is shown that, whether he looked or not, he failed to stop, and took the chance of crossing ahead of it. (p. 817.)

J. H. Beal and Knox & Reed, for the appellant.

G. B. Gordon, for the appellee.

[880] DEAN, J. On May, 9, 1898, about noon, Charles H. McCracken and his son Charles H. McCracken, Jr., the son being about twenty years of age, started on bicycles from the father's store in East End, Pittsburg, to their home on Centre avenue. Their route from the store was on Morewood avenue, a wide street with descending grade which strikes Centre avenue but does not cross it. Centre avenue is sixty feet wide and has on it the two street-car tracks of defendant company. The tracks are in the middle of the street and on each side is a carriageway. The grade is a descending one from a point six hundred feet west of Morewood avenue to a bridge three hundred feet east. Centre was a straight street and the view unobstructed in each direction for six hundred feet from Morewood. About one hundred and fifty feet from Centre avenue, father and son both then being on the right-hand side of Morewood, the son quickened his speed and ran ahead of his father across the tracks on Centre to the left-hand side of that street, turned his wheel and saw a car coming. He shouted to his father, who was still on the other side, to "look out." The father, either not hearing

the warning or disregarding it, kept on across the tracks. The running-board of the car struck the hind wheel of his bicycle, throwing him to the ground and so [381] seriously injuring him that he died. The son had forged ahead of the father for the express purpose of giving him warning, if warning was needed, of an approaching car. There was evidence that the car was going at a high rate of speed at the time and that it gave no warning by gong.

The plaintiff brought this suit, alleging that her husband's death was caused by the negligence of the company in running its cars at such a high rate of speed at that point and in failing to give the usual warning on approaching Centre avenue. The defendant averred contributory negligence on the part of deceased, in that he recklessly crossed the track without looking or listening. The learned judge of the court below submitted the evidence bearing on both questions to the jury. There was a verdict for the plaintiff and we now have this appeal by defendant. There are six assignments of error; among others, that the court denied defendant's fourth point, as follows: "It is the duty of bicycle riders about to cross a street railway to look and listen at the edge of the track. If he fails to do so, he is guilty of negligence per se, and since decedent in this case failed to look and listen, or if he did so rode directly in front of an approaching car which struck him, he was guilty of contributory negligence, and therefore plaintiff cannot recover."

Should this point have been affirmed? The jury has found that the defendant was negligent, and therefore we assume that fact. The only question is, Is it established as a fact that the deceased was negligent? If there be any doubt about the answer, either from inference or positive evidence, the case was for the jury, as the court below held. Both deceased and the company attempted to use that particular place on the track at the same instant of time; hence the injury. The dominant right to the track was in the defendant. That right must be conceded and deferred to by all of the public who have a right to cross. When about to cross they must use ordinary prudence to ascertain whether the owner of the track is about to use it. The tracks were here straight and clearly visible for a distance of about twelve hundred feet, and at least six hundred feet in the direction from which the car was coming it could be seen. Deceased was bound to look and listen before crossing. A bicycler is not exempt from the caution imposed upon all others of the public [382] about to cross railway tracks; to hold other-

wise would be to give the bicycler a right on the tracks superior to that of the railway company. As a necessary preventive of accident we would be compelled then to hold that the motorman must stop and look out for the bicycler. In passing on the question as to whether the bicycle is a vehicle chargeable with toll on turnpikes, we have held that it was; therefore, in propelling his vehicle the rider was bound to exercise in some degree the care of a driver of a team. Nearly ten years ago, when electricity as a motor was just coming into general use, in Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. St. 180, 24 Atl. 596, and Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187, 24 Atl. 688, both street railway cases, we held that it is the duty of one about to cross a street railway "to look as he approaches the track, and if there is any obstruction to listen, and his neglect to do so is negligence per se; and that this is an unbending rule to be observed at all times and under all circumstances. In the case of steam railroads a question sometimes arises as to the proper place to stop, look and listen; but no such question arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accidents." These cases were followed by Hess v. Williamsport etc. R. R. Co., 181 Pa. St. 492, 37 Atl. 568, Trout v. Altoona etc. Traction Co., 13 Pa. Sup. Ct. 17, Darwood v. Union Traction Co., 189 Pa. St. 592, 42 Atl. 290, and other cases. The evidence is uncontradicted that without change of speed or turning his head the deceased went straight across. Thus far we have discussed the case on the assumption that deceased did not look, and was therefore negligent; but concede that as argued, he did look, but the speed of the car was so great that what would have been otherwise a not dangerous attempt to cross, yet against all prudent calculation proved a mistake in this case. With one exception the plaintiff's own witnesses, including the son, all put the distance of the car when he attempted to cross at fifty to seventy-five feet, besides putting him on the safe side of the track before touching the rail. He then had just seventeen and one-half feet to go to entirely clear both tracks and place himself and wheel outside the running-board on the far side of the car. He was moving at the rate of eight or ten miles per hour, which would be ten to fifteen feet per second. If the car were moving at the rate of twenty-five [888] miles per hour-a highly improbable speed—it would run over the distance to where deceased was struck in just about the time it took him to reach the same point from Morewood ave-

nue. To attempt to cross with a rapidly moving car in full view under such circumstances was taking, to say the least, a very grave and unnecessary risk. Several of the plaintiff's witnesses who saw both him and the car when he started across say they were afraid the car would strike him. Their perceptions were not quickened by any personal peril as his ought to have been. What was probable to them ought to have been so to him and have brought into exercise that degree of prudence which would have avoided the fatal consequence. Clearly, there is no possible view of the evidence, no reasonable inference from it, which will acquit him of contributory negligence.

It is argued with much earnestness that it is incredible that a man of mature years, in full possession of his faculties, would take such a risk; that, clearly, he was misled by thinking the car was running at a lawful rate of speed when that speed was a recklessly rapid one. Assuming, as we have assumed, that the rate of speed at that point was unlawful, that fact was just as obvious to him, or would have been if he had looked, as to his son and several other witnesses of plaintiff who observed the car from about the same point of view. But the argument, while specious, is not sound, because not in accord with common observation. It is per se negligence to get on or off a moving car; yet we see usually prudent and careful men every day commit that act and comparatively few are injured; but, nevertheless, it is negligence. Many persons usually careful attempt to cross in front of a moving car; many do not stop, look, and listen when about to use the crossing of a steam railroad. While the fear of death or mangling ought to prompt care, we know from long observation of the appeals in this court that in very many cases it does not. We cannot, therefore, assume that it is incredible that deceased attempted to cross in front of a rapidly moving car in full view.

The able argument of appellee's counsel does not convince. It assumes a fact which is not proven and cannot be inferred—that is, that when McCracken attempted to cross the tracks the car was five hundred feet distant. It is possible, but not probable, that when he made up his mind to cross the car was one hundred or two hundred feet [348] distant; but where was it just as he approached the first rail? He was then bound to look. It was then just about one second in time distant; about the time it took McCracken to cross the roadbed. If he then looked, as he was bound to do, he saw it and was negligent in attempting to cross; if he did not look it was negligence in him not

to do so. There was no imperious necessity dictated by hastily formed judgment impelling him to go straight on as in cases where a man by no fault of his own is in peril; he was then still in a place of safety; he could have stopped and dismounted, or he could have kept outside of the rail on the same side of the road. To argue that he could not cross because a car, when he saw it, five hundred feet off without fault on his part ran him down, is at war with every man's senses and experience derived from observation. The car obviously had only to traverse as many feet on the rails as would equal McCracken's time in the seventeen and one-half feet crossing them. In not one of the many authorities cited by appellee's counsel were the controlling facts at all like unto the indisputable ones in this case.

In the view we take of the law applicable to the fourth assignment of error, the other five become immaterial and we do not discuss them.

The judgment is reversed and a judgment is entered for the defendant.

MESTREZAT, J., dissenting. This case was clearly for the jury and having been properly submitted by the learned trial judge, I would affirm the judgment of the court below.

Railroad Crossings.—One about to cross a railroad track is under an absolute duty to look and listen for approaching trains. It is presumed, however, that he does so: Weller v. Chicago etc. R. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and cases cited in the cross-reference note thereto. This rule applies to a bicyclist: Robertson v. Pennsylvania R. R. Co., 180 Pa. St. 43, 57 Am. St. Rep. 620, 36 Atl. 403. The unlawful rate of speed of the car or train, as affecting the liability of the railway company in such cases, is considered in Hosie v. Alabama etc. Ry. Co., 78 Miss. 413, 84 Am. St. Rep. 632, 28 South. 941; Hutchinson v. Missouri Pac. Ry. Co., 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852; Jackson v. Kansas City R. R. Co., 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32.

Street Railways.—As to the relative rights of street-cars, vehicles, and pedestrians to the use of public streets, see the note to Western Paving etc. Co. v. Citizens' St. R. R. Co., 25 Am. St. Rep. 475-482; North Chicago St. R. R. Co. v. Zeiger, 182 Ill. 9, 74 Am. St. Rep. 157, 54 N. E. 1006; Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. 140; Hall v. Ogden etc. Ry. Co., 13 Utah, 726, 57 Am. St. Rep. 726, 44 Pac. 1046; Thatcher v. Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. Rep. 645, and cases cited in the cross-reference note thereto.

HEH v. CONSOLIDATED GAS COMPANY.

[201 Pa. St. 443, 50 Atl. 994.]

TRIAL—EVIDENCE, WHEN MUST GO TO JURY.—A binding instruction is proper when the evidence is not conflicting and presents the facts on which the case depends clearly and distinctly; but if the evidence is conflicting or fails to present the facts fully, so that inferences are to be drawn, or the credibility of witnesses is to be settled, the evidence must go to the jury. (p. 821.)

NEGLIGENCE.—HIGHER DEGREES OF CARE AND VIGILANCE are required in dealing with a dangerous agency, such as gas, than in the ordinary affairs of life or business, and, while no absolute standard of duty in dealing with such agencies can be prescribed, every reasonable precaution suggested by experience and the known dangers of the subject must be taken. (p. 821.)

NEGLIGENCE.—IN THE CASE OF GAS COMPANIES, the material and workmanship of the pipes and fittings must be of the highest character, and every precaution which is within the bounds of reason must be taken to guard against deterioration, misplacement, or leakage. (p. 822.)

NEGLIGENCE—GAS COMPANIES—QUESTION FOR JURY.—If plaintiff shows a series of acts from which the inference of negligence on the part of a gas company arises, sufficient to carry the case to the jury, that inference remains until overcome by countervailing proof, and whether it is so overcome is a question of fact to be determined by the jury and not by the court. (p. 823.)

TRIAL—DIRECTING VERDICT.—The rule that a verdict may be directed if a different conclusion could not be reached by the jury without a capricious disregard of apparently truthful testimony that is in itself probable, and is not at variance with any proved or admitted facts, does not apply if there is a conflict of testimony, unless that on one side amounts only to a scintilla. (p. 823.)

J. E. O'Donnell and G. H. Stengel, for the appellant.

E. W. Smith and Knox & Reed, for the appellee.

445 POTTER, J. The plaintiff in this case was the owner of a brick dwelling-house, situated on Wylie avenue, Pittsburg. The defendant company conveys gas along that street through two four-inch mains. The one upon the south side of the street and nearest to plaintiff's property is about eleven feet from the cellar wall and about three feet underground. The evidence indicates that the soil in that vicinity is soft and shaly. The plaintiff does not use gas in his house, nor was it piped for that purpose, but a short pipe extended from the main through the front wall of the cellar.

On the night of April 5, 1899, gas was found to be escaping from the defendant's pipes into the cellar of plaintiff's house,

and an explosion occurred, followed by fire, which resulted in material injury to the property. It appears that an abandoned coal mine extended beneath that entire neighborhood. Near the plaintiff's house the roof of the mine is only about thirteen feet below the surface and about seven feet below the bottom of plaintiff's cellar. After the fire in the cellar was extinguished, the underlying strata of coal was found to be burning, and, notwithstanding continued efforts to put it out, continued to burn for more than a month. The defendant company was charged with negligence in permitting the escape of the gas, and in not exercising proper caution in the care and maintenance of the pipes at that locality. This action was brought to recover for the resulting damages. Upon the trial it was not denied that the gas was escaping from the main, and it is here admitted that this fact was in itself prima facie evidence of negligence, which must be met and explained by the defendant, but it is contended that the evidence upon the part of the defendant did rebut the presumption of negligence raised by the plaintiff's evidence, by showing that the leakage was caused by the caving in of the abandoned coal mine.

The defendant's theory of the case was that in some way the old workings took fire, and the pillars of coal which had been left standing for the purpose of supporting the surface burned out. This view is thus stated in the printed brief. "The 446 pillars in the mine burned out, and let down the line, which broke, and the gas escaped."

The trial judge accepted this theory, and evidently regarded it as a satisfactory and sufficient explanation, and directed a verdict for the defendant. We find, however, from an examination of the evidence that there was some testimony of similar trouble at that point some months before. People had been overcome by escaping gas, and the company, after searching, had found a break in the main just across the street from plaintiff's property. The gas at that time had worked its way underground for a distance of about one hundred and twenty-five feet into the plaintiff's cellar. That was in February before the accident. One witness, referring to the pipe, testified that "it broke on account of the sewer being put in the summer before, the summer of 1898, and that line was undermined." Defendant's district superintendent also testified that he learned during the summer before, of the existence of the old coal mine. According to another witness the pipe that was taken out in repairing the former break was "very rotten," and badly rusted.

Other witnesses testified to seeing holes in the pipe when it was exposed by digging after the accident.

This evidence shows that defendant must have been familiar with the conditions in this locality, and knowing of the mine and its possible effect on the stability of the pipe lines, it was for the jury to say whether, under all the facts, defendant did its duty in regard to those lines of pipe by way of inspection, repair, bracing, etc. According to the witnesses for the plaintiff, there was no indication of fire in the coal mine beneath, prior to the time of the accident. Even if the evidence for the defendant be considered as undisputed, it does not show clearly how the leak was caused. Defendant's theory is at most only an inference from the facts shown by the testimony. The evidence, taken as a whole, shows a decided difference between the witnesses as to material facts, and as to the inferences to be drawn from them. Inferences from the facts are to be drawn by the jury, and are not for the court.

In Spear v. Philadelphia etc. R. R. Co., 119 Pa. St. 61, 12 Atl. 824, Justice Williams said: "A binding instruction is proper where the evidence is not conflicting and presents the facts on which the case depends clearly and distinctly, but if the evidence is contradictory, [447] or if it fails to present the facts fully, so that inferences are to be drawn, or the credibility of witnesses is to be settled, the evidence must go to the jury. The value or legal effect of facts not in controversy may be determined by the judge, but the facts themselves if in doubt must be found by the jury."

The defendant company is dealing with a dangerous substance, and must be held to a high degree of care. As was said in Koelsch v. Philadelphia Co., 152 Pa. St. 335, 34 Am. St. Rep. 653, 25 Atl. 522: "The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken."

In the case of a gas company, the material and workmanship of the pipes and fittings should be of the highest character, and every precaution which is within the bounds of reason should be taken to guard against deterioration or misplacement.

The language of our brother Fell in Devlin v. Beacon Light Co., 198 Pa. St. 585, 48 Atl. 483, applies directly to the case in hand: "The plaintiff showed a series of acts from which the inference of negligence on the part of the defendant arose; that inference was sufficient to carry the case to the jury. Having once arisen, it remained until overcome by countervailing proof. Whether so overcome was a question of fact which the court could not determine. The rule stated in Lonzer v. Lehigh Valley R. R. Co., 196 Pa. St. 610, 46 Atl. 937, that a verdict may be directed where a different conclusion could not be reached by the jury without a capricious disregard of apparently truthful testimony that is in itself probable, and is not at variance with any proved or admitted facts, does not apply where there is a conflict of testimony, unless that on one side amounts only to a scintilla."

In the present case it may be conceded that the evidence tending to rebut the presumption of any negligence upon the part of the defendant company is strong, but its sufficiency is a matter for the jury and not for the court.

Judgment reversed and venire facias de novo awarded.

A Gas Company is bound to exercise such care, skill, and diligence in all its operations, and in the transaction of all branches of its business, as is called for by the delicacy and difficulty of the nature of its business: See the monographic note to Shepard v. Milwaukee Gas Light Co., 70 Am. Dec. 488. Consult, also, Dow v. Winnesaukee Gas etc. Co., 69 N. H. 312, 76 Am. St. Rep. 173, 41 Atl. 288; Evans v. Keystone Gas Co., 148 N. Y. 112, 51 Am. St. Rep. 681, 42 N. E. 513; Kollsch v. Philadelphia Co., 152 Pa. St. 355, 34 Am. St. Rep. 653, 25 Atl. 522; Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 Am. St. Rep. 203, 28 N. E. 1113.

KEEFER v. PACIFIC MUTUAL LIFE INSURANCE CO.

[201 Pa. St. 448, 51 Atl. 366.]

INSURANCE, LIFE—DEATH FROM EXTERNAL, VIOLENT, AND ACCIDENTAL CAUSE.—Evidence that the insured, a man in apparent good health, with no premonitory symptoms of serious disease, left his home for a walk, came back in half an hour with a bruise on his right temple and scratches on his face, saying he had fallen on loose stones in the path, complained of pain in his head, shortly lapsed into unconsciousness, and remained in that condition two days until he died, that no one saw the alleged fall, that his attending physician was unable to state with any certainty the cause of death, but that there were present symptoms of uraemic poisoning, is wholly insufficient to support a finding that death resulted from external, violent, and accidental cause. (p. 824.)

EVIDENCE—DECLARATIONS—RES GESTAE.—No fixed time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction. (p. 825.)

EVIDENCE — RES GESTAE — DECLARATIONS.—Declarations of a deceased as to an alleged fall causing death are not admissible as part of the res gestae, if he must have arisen after the fall and returned over a distance of several hundred feet, covering a period of from fifteen to thirty minutes, before he came walking deliberately back to the witnesses who are offered to prove his declarations. (p. 826.)

Action to recover on a policy of accident insurance providing that the insurance should become due only in case of death from bodily injuries caused solely by external, violent and accidental means. The facts not stated in the principal opinion will be found in the dissenting opinion of Mr. Justice Mitchell, appended to this case.

J. W. Wetzel and C. H. Bergner, for the appellant.

M. D. Detweiler and A. G. Miller, for the appellee.

453 POTTER, J. The real subject for consideration in this case is not accurately set forth by appellant in the statement of the question involved. The court below did not, as therein stated, reserve a point that, "under all the law and evidence in the case, the verdict must be for the defendant." The actual point reserved was, whether there is any evidence that John W. Keefer's death was caused solely by external, violent and accidental causes. Under this reservation the question for consideration is not whether the insured did die from external, violent and accidental means, but whether or not there was any evidence in the case which would justify the jury in so finding. The court left it to the jury to decide whether John W. Keefer's death was due solely to external, violent and accidental causes, or whether it was occasioned either wholly or in part by disease, reserving for further determination the question as to whether there was any evidence to justify the jury in concluding that the death was due to external, violent and accidental cause.

The appellant has presented here six assignments of error. The fifth of these is, that the learned court erred in entering judgment upon the question of law reserved. It does not appear, however, from the record that any exception was taken by plaintiff to the entry of judgment in the court below; and

as Judge Sharswood said in Northumberland County Bank v. Eyer, 60 Pa. St. 439: "It is evident that without a bill of exceptions the facts admitted or found, on which the question was reserved, are not properly on the record." This disposes of the fifth assignment of error.

Turning to the fourth specification, we find that it alleges [454] error upon the part of the court, in reserving the question of law; but here again the record fails to show that any exception was taken to the form of the reservation of the question, upon which judgment was subsequently entered; and under Rynd v. Baker, 193 Pa. St. 486, 44 Atl. 551, and cases there cited, the appellant cannot now be heard in this court against it. The question of law actually reserved was, "whether there is any evidence in this case that John W. Keefer's death was caused solely by external, violent and accidental causes." This was undoubtedly a good reservation, and is in accordance with the requirements laid down in the line of cases culminating in Casey v. Pennsylvania Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128. The fourth assignment of error must, therefore, fall.

We have not, however, rested upon the lack of compliance with technical requirements, but have carefully reviewed the testimony. We have looked in vain for any evidence upon which could be based a finding that the death was caused by external, violent and accidental means. Nor is there room for any such inference to be reasonably drawn from anything in the proofs. It is only by drawing an inference from an inference, instead of from a fact, or by basing a presumption upon a presumption, that such a result can be reached. The plaintiff's right to recover was limited under the terms of the policy to death from violent, external and accidental causes. If death was the result of disease, the claim made here was without foundation. The burden of proof was upon the plaintiff, and how was it sustained? The jury were asked to infer: 1. That the plaintiff suffered a fall; 2. That the fall was accidental, and not the result of disease such as vertigo or cerebral apoplexy; 3. That death resulted as a consequence of the fall. All this in the absence of an eye-witness to the fact of accidental or external injury, and without direct evidence that there was a fall. No one testified how, when, or where it occurred. Nowhere in the testimony does there appear anything more than a conjecture that the death was caused by accident, rather than by disease. The physician who was in attendance upon the

deceased for the two or three days intervening between the first seizure and the death, and who also made the post-mortem examination, was unable to speak with any certainty or conviction as to the cause of death.

455 The expert medical testimony was strongly in support of the theory that death resulted from uræmic poison. Under such circumstances the finding of the jury that the cause of death was accidental and external could be nothing more than a mere guess. How could a conclusion thus reached be sustained, in the absence of any direct proof as to the fact, the cause, or the effect of a fall? No presumption can with safety be drawn from a presumption.

The plaintiff's first point requested the court to charge that the presumption in this case is that the contused wound upon the right temple of John W. Keefer was an accidental injury, and the court's refusal to so charge is made the subject of the third assignment of error. But we see no mistake here, and we think the learned court was right. The point as presented was not in line with the question for determination. The inquiry was not as to the cause of the bruise, but as to the cause of the fall, and there could be no presumption as between disease and accidental cause within the terms of the policy. This assignment is therefore overruled.

We are satisfied that the opinion of the learned court below, upon the question of law reserved, is fully vindicated by the facts of the case.

This leaves for consideration the first, second and sixth assignments, which all allege error in the rejection of the declarations of the deceased. They were rejected as being too remote in time and place from the main fact to be admissible as part of the res gestae. As was said by our brother Mitchell in Commonwealth v. Werntz, 161 Pa. St. 596, 29 Atl. 273: "No fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction."

In the present case the main fact inquired about was a fall, which if it occurred must have been almost instantaneous. It would be hard to suggest an instance in which the main fact would occur more quickly, and the event be sooner ended. It is unlike the case of a fight, more or less prolonged, or an assault, or a transaction involving some time in its occurrence.

It would be an act practically no sooner begun than ended. If [456] the offer had been to prove an exclamation or a cry, uttered during the act of falling, or an explanation made immediately upon rising, and before sufficient time had elapsed to permit the possibility of deliberation or design, then the offer would have been within the rule. But as it was, every settled test excludes it. If the deceased fell while walking by himself, he got up and returned over a distance of several hundred feet, and a period of time varying from fifteen minutes to half an hour elapsed before he came walking deliberately back to the witnesses.

This, under the circumstances, was a marked break in the continuity of events; was quite sufficient to turn any explanation then made into a narrative of a past occurrence; was ample to permit of deliberation or design, and thus removed the impress of spontaneity. The deceased had gone away from the place. The act was done; the transaction was closed. Therefore, a conversation at a time some fifteen minutes later and at a place several hundred feet away could not, under the circumstances of this case, be admitted as evidence. It would be no part of the occurrence, and would be only his own account of the affair.

The assignments of error are all overruled and the judgment is affirmed.

MITCHELL, J., dissenting. A man in apparent good health, with no evidence of any premonitory symptoms of serious disease, left his home for a walk, came back in half an hour with a bruise on his right temple and scratches on his face, saying he had fallen on loose stones in the path, complained of pain in his head, shortly lapsed into unconsciousness, and remained in that condition two days until he died. Prima facie the evidence points to external violence as the cause of death. The fact that the injuries were not such as ordinarily would kill, and the presence of symptoms indicating uraemic poisoning, may raise a doubt as to the real cause of death, but it is a doubt for a jury, not the court, to settle. The absence of a complete post-mortem examination which might more clearly have determined the cause of death is not the plaintiff's fault. Defendant had notice and did not ask a post-mortem. I am also of [457] opinion that the declarations of the deceased as to the cause of the fall were clearly within the rule as to res gestae, and regard the opinion in this case as at variance with that filed to-day in Van Eman v. Fidelity etc. Co., 231

Pa. St. 537, 51 Atl. 177. I would reverse this judgment and enter judgment for plaintiff on the verdict.

Accident Insurance.—What is death by accidental means within the meaning of the law of accident insurance is considered in the notes to Paul v. Travelers' Ins. Co., 8 Am. St. Rep. 763-766; Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 859, 860; Travelers' Ins. Co. v. Jones, 12 Am. St. Rep. 272-274. See, too, Omberg v. United States Mut. etc. Assn. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; Feder v. Iowa etc. Assn., 107 Iowa, 538, 70 Am. St. Rep. 212, 78 N. W. 252; Carnes v. Iowa etc. Assn., 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683. If a temporary and unexpected physical disorder causes the insured to fall and injure himself, the injury is received through violent, external, and accidental means: Meyer v. Fidelity etc. Co., 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328. Evidence of the cause of death is considered in the note to Meadows v. Pacific etc. Ins. Co., 50 Am. St. Rep. 441-443.

Res Gestae are the circumstances, facts, and declarations that grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: Hermes v. Chicago etc. Ry. Co., 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; Pinney v. Jones, 64 Conn. 545, 42 Am. St. Rep. 209, 30 Atl. 762. Declarations, in order to be a part of the res gestae, must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are regarded as contemporaneous: State v. Arnold, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926; Elder v. State, 69 Ark. 648, 86 Am. St. Rep. 220, and cases cited in the cross-reference note thereto, 65 S. W. 938.

WOODROFFE v. ROXBOROUGH, CHESTNUT HILL AND NORRISTOWN RAILWAY COMPANY.

[201 Pa. St. 521, 51 Atl. 324.]

STREET RAILWAYS—NEGLIGENCE OF PASSENGER.—A passenger who stands on the platform or side steps of an electric street-car, when there is either a vacant seat or room to stand inside the car, assumes not only the ordinary risks of the road, but also all risks incident to his position, unless he shows some valid reason or excuse for his position at the time of the accident. (p. 828.)

STREET RAILWAYS—POSITION OF PASSENGER—NEGLIGENCE.—If a passenger rides on the side steps of a street-car with the knowledge and consent of the conductor and from necessity for want of room to sit or stand inside, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers; but if he rides in such position when it is reasonably practicable for him to sit or stand inside the car, he takes upon himself the risk of his position from any cause. (p. 828.)

F. Rawle, for the appellant.

T. C. Patterson, for the appellees.

522 FELL, J. A passenger who stands on the platform of an electric-car when there are vacant seats inside of the car assumes not only the ordinary risks of the road, but all the risks incident to that position. "The proper and assigned place for passengers is inside the car. Unless he shows some valid reason to excuse him, a passenger is bound to put himself in the appointed place, and if he does not he takes the risk of his location elsewhere. This is the settled rule of all our cases": Thane v. Scranton Traction Co., 191 Pa. St. 249, 71 Am. St. Rep. 767, 43 Atl. 136. The side steps of an open summer car are not intended for the use of the passengers except in getting in and out of the car. When a passenger rides on the side steps with the knowledge and consent of the conductor, and from necessity from the want of room to sit or stand inside the car, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers. But a passenger who rides on a side step when it is reasonably practicable for him to sit or stand inside the car takes upon himself the risk of his position from any cause: Bumbear v. United Traction Co., 198 Pa. St. 198, 47 Atl. 961.

The plaintiff's husband, while riding on the side steps of an open car, was killed by contact with a pole which supported the electric wire. It was overwhelmingly established by the testimony that the conduct of the deceased was disorderly and reckless; that he disregarded repeated warnings of his danger; and that when injured he was holding the upright handrail with his arms extended and his body and head thrown back from the car. These facts should have prevented a recovery 523 with the jury. But there was one fact that appeared from the testimony of the plaintiff's witnesses which was conclusive against her right to recover, and should have been so declared by the court. It was said in the charge: "I have read the testimony carefully, and there is not a single witness for the plaintiff who says there was no standing room in the car. They all one by one and one after the other admitted that there was standing room; that the man need not have stood in a dangerous place, and that he could have obtained a place of safety if he had thought proper. I have said that every witness for the plaintiff has affirmed that there was standing room." The correctness of this statement is not, and cannot be, questioned.

There was, then, no legal ground for recovery, and the defendant's tenth point, asking for a peremptory instruction for the defendant, should have been affirmed.

The judgment is reversed and judgment is now entered for the defendant.

A Street-car Passenger, by taking his stand upon the outside running-board of the car, assumes the risk of such dangers as obviously are incident to that position: Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 68 Am. St. Rep. 723, 40 Atl. 645; Watson v. Portland etc. Ry. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699. It has been held that, if there are vacant seats inside, he is guilty of negligence per se: Thane v. Scranton Traction Co., 191 Pa. St. 249, 71 Am. St. Rep. 767, 43 Atl. 136. But see Watson v. Portland etc. Ry. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699; Reber v. Pittsburg etc. Traction Co., 179 Pa. St. 339, 57 Am. St. Rep. 599, and cases cited in the cross-reference note thereto, 36 Atl. 245.

KILBRIDE v. CARBON DIOXIDE AND MAGNESIA CO.

[201 Pa. St. 552, 51 Atl. 347.]

NEGLIGENCE—FAILURE TO ADOPT PARTICULAR APPLIANCE OR TEST.—In the absence of proof against a defendant charged with negligence that he knew that appliances used by him were defective, or that they were in fact defective, or that he deviated from any standard of care observed by those engaged in the same business, or of his failure to test the safety of his appliances as others in this country tested theirs, the mere fact that he has not adopted and used a particular method of testing in use in a foreign country but never before heard of in this, does not constitute negligence. (pp. 831, 832.)

NEGLIGENCE IS NOT COMMITTED simply because a particular accident might have been prevented by some special device or precaution not used and not in common use. (p. 832.)

NEGLIGENCE.—THE UNBENDING TEST of negligence in methods, machinery, and appliances, is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. (p. 832.)

NEGLIGENCE—TEST OF.—FAILURE TO DO SOME PARTICULAR THING which might have prevented an accident, and which is brought to the attention of the party charged with carelessness for the first time only after the accident has happened, is not the test of negligence. (p. 833.)

J. H. Gendell, for the appellant.

T. J. Meagher and P. Duffy, for the appellee.

554 BROWN, J. John J. Kilbride, the husband of plaintiff, was an employé of the Pennsylvania Railroad Company,

and, on January 24, 1898, died, as is alleged, from injuries inflicted by the explosion of a cylinder charged with carbon dioxide, commonly known as carbonic acid gas. This gas is used for charging soda water and other carbonated waters and drinks. The defendant company is engaged in its manufacture in large quantities, and ships tubes or cylinders charged with it to customers throughout the country. On the day of the alleged explosion it had shipped twenty-five of these tubes or cylinders, so charged, from its factory, in the city of Philadelphia, to Brooklyn, via Pennsylvania Railroad. The tubes had been transported by the railroad company across the Schuylkill river to Mantua station, where they were being transferred to another car containing general merchandise, when one of them, according to appellee's contention, exploded as the deceased was about to lay it down in the car in which it was to be taken to Brooklyn, causing concussion of the brain, that resulted in his death when he was entering the hospital. On the trial the case was submitted to the jury under instructions that, if the death of the deceased was due to the explosion of a defective cylinder, which defendant had negligently failed to test, the plaintiff ought to recover; and there was a finding in her favor.

The contention of the appellant in the court below was, and is now, first, that there was not sufficient proof that the tube had exploded because it had become weakened by rust, as alleged by the appellee, and, secondly, that there was no proof at all of negligence on the part of the company in failing to test it. Assuming that there was sufficient evidence to submit to the jury in support of the allegation that the cylinder had become weakened on the inside at a certain point by rust, and that the explosion was due to its weakened condition there, the only question to be considered is whether, under the undisputed facts in the case, the defendant was negligent in failing to properly test it.

The learned trial judge in charging the jury correctly said there was no evidence that the cylinder had been overcharged, [555] that the defendant knew of its alleged defective condition, or that there was anything on the outside of it to indicate that it was rusted or corroded on the inside, or in any way weakened. In support of the theory that it must have been rusted, the plaintiff proved that some other cylinders—a small percentage of the whole—had had water in them when returned to the defendant from customers, resulting, as claimed, in rust, after they had been stored for some time; but the jury were told that as to this particular cylinder, there was no evidence that it ever came

back with water in it. They were properly reminded that there was no evidence of anything about it indicating that it was defective; but they were also told, "if it was defective and the fact that it was defective was one which the defendant ought to have known," the plaintiff ought to recover.

The burden of proving the negligence charged was upon the plaintiff; but the court, in the absence of any proof that the defendant knew, or ought to have known, that the cylinder was defective, allowed the jury to guess that if it was, the defendant ought to have known the defect, and was negligent in using it. The undisputed facts are, that this cylinder had been purchased from the National Tube Works, a company of high standing and most extensive business, which had furnished many thousands of the same kind to the defendant and sold to its different customers one hundred and fifty thousand of them, and, with the single exception of this one, none had ever exploded, save as the result of heat; that this one had been purchased only after it had been actually tested by the company that sold it at a pressure of three thousand seven hundred pounds to the square inch, at least six times the pressure which was upon it at the time of the explosion, and every time it had been charged it had been subjected to an actual test several hundred pounds greater to the square inch than existed when it was being transported; that when it was being filled by the filling apparatus, the pressure was always far in excess of that which it sustained when sent out to customers; that thousands of similar cylinders had been used by the defendant, some of them for many years, with perfect safety, subjected to no other test than the one invariably made when they were being filled at the pressure much greater than continued after they were separated from the filling apparatus [556] and shipped away; and that no one of them had ever exploded before as it is alleged this one did.

There was no proof that there was any general usage or custom in this country as to testing these cylinders; but, on the contrary, there was testimony that none existed here. It is urged, however, that because a single witness for the plaintiff testified that there was a method of testing them used in England and Switzerland, it was negligent in the defendant not to have used it here, and that, therefore, the plaintiff ought to recover, though, as the court properly said to the jury, there was no evidence that the cylinder had been overcharged, or that the defendant knew of any alleged defect in it, or that there

was anything on the outside of it to indicate that it was rusted or corroded on the inside, or in any way weakened, and, in the face of what we have just called attention to as the test pressure, to which this comparatively new cylinder had been subjected each of the six times it was filled with gas.

No deviation by the defendant from any standard of care observed by those engaged in the same business was shown; no failure to test its tubes or cylinders as others tested theirs in this country was proven; and to hold that, simply because it had not adopted and used a particular method of testing, in use in England and Switzerland, according to the testimony of one witness, and never heard of here, so far as can be learned from what all the others said, would be to declare it to be negligence, in cases like this, not to adopt an appliance that is in exceptional and not in general use; but this is not the law. It is not negligence because a "particular accident might have been prevented by some special device or precaution not in common use": Northern Cent. Ry. Co. v. Husson, 101 Pa. St. 1, 47 Am. St. Rep. 690. "It is not enough that some persons regard it as a valuable safeguard. The test is general use": Delaware River Iron Shipbuilding Works v. Nuttall, 119 Pa. St. 149, 13 Atl. 65. "The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man": Titus v. Bradford etc. R. R. Co., 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517. In the foregoing cases the question of negligence arose between employer and employé, [557] but "there is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill": Ardesco Oil Co. v. Gilson, 63 Pa. St. 146. In Spencer v. Campbell, 9 Watts & S. 32, Gibson, C. J., "put the liability of the proprietors of a steam mill for damages caused to a customer by the bursting of its boiler upon the true ground—want of ordinary care and skill in its management": Thompson's Commentaries on the Law of Negligence, 700. See, also, Dougherty v. Philadelphia etc. R. R. Co., 171 Pa. St. 457, 33 Atl. 340; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Dec. 394.

Though it nowhere appears, as stated, that before this accident the defendant, or any other person engaged in the same business in this country, had ever heard of the test method

used in the two foreign countries, yet the only negligence that the jury could have found it guilty of was its failure to adopt that method. No other was called to their attention by the plaintiff as one which the defendant ought to have used, and there was nothing about the tube to even indicate that it ought to have been sent by the defendant to the National Tube Works to be retested, as others were when there were indications of weakness on the outside. There is nothing more in the case, as presented by the plaintiff, than that, after the unfortunate accident happened, it was discovered the defendant might have used a test method used in a foreign country, which might have prevented the explosion. In Northern Cent. Ry. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690, it was said: "Almost all accidents could be avoided if the especial manner of their occurrence could be foreseen"; and we may add that, after almost every one, theories are advanced as to how it could have been avoided; but a defendant's liability for negligence is not to be so determined. What would have been wise, simply in view of what is learned after an occurrence like this, is no criterion of care. Failure to do some particular thing which might have prevented an accident and which is brought to the attention of the party charged with carelessness for the first time after the accident has happened, is not the test of negligence; the standard of proper care is the observance of prudence as the average man observes it, by following the ordinary usage of his business: Titus v. Bradford etc. R. R. Co., 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517. If, having exercised [558] such prudence, unforseen accidents occur, negligence cannot be imputed to him.

From a review of this whole case, no negligence of the defendant can be discovered; on the contrary, the affirmative proof is, that it had been careful, and the ninth point submitted by it should have been affirmed. The judgment is reversed and is now entered for the defendant.

Employers are not Insurers of Their Employés. They are liable for the consequences, not of danger, but of negligence. And the unbending test of negligence in method, machinery, and appliances is the ordinary usage of the business. Moreover, no man is held to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man: Service v. Shoneman, 196 Pa. St. 63, 79 Am. St. Rep. 689, 46 Atl. 292; Purdy v. Westinghouse etc. Mfg. Co., 197 Pa. St. 257, 80 Am. St. Rep. 816, 47 Atl. 237;

Martin v. Highland Park Mfg. Co., 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876. An employer is not bound to furnish the safest machinery and appliances: Kent v. Yazoo etc. R. R. Co., 77 Miss. 494, 78 Am. St. Rep. 534, 27 South. 620; Wormell v. Maine Cent. R. R. Co., 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49. Compare Troxler v. Southern Ry. Co., 124 N. C. 189, 70 Am. St. Rep. 580, 32 S. E. 550. And, on the general liability of a master to furnish safe tools and appliances, see the monographic notes to Chicago etc. R. R. Co. v. Swett, 92 Am. Dec. 213-221; Buzzell v. Laconia Mfg. Co., 77 Am. Dec. 218-225.

ALLEN v. INTERNATIONAL TEXT-BOOK COMPANY.

[201 Pa. St. 579, 51 Atl. 323.]

RES JUDICATA.—The judgment of a court of concurrent jurisdiction directly on the point is as a plea in bar or as evidence conclusive between the same parties on the same subject matter directly in question in another court. (p. 835.)

RES JUDICATA—WRONGFUL DISCHARGE.—If a servant employed for a certain period at a fixed salary per week is discharged during the term, and afterward recovers judgment for several installments of salary, such judgment is conclusive of the wrongfulness of his discharge, in an action brought by him after the expiration of the term to recover the balance of salary due, and confines the defense to proof of payment, release, or facts in mitigation of damages. (p. 835.)

D. C. Harrington, for the appellant.

J. J. Williams, A. Simpson, Jr., and F. S. Brown, for the appellee.

582 FELL, J. The plaintiff was employed for one year at a fixed salary payable in weekly installments. He was discharged during the period, and two weeks afterward he sued for installments of his salary and recovered a judgment, which was paid by the defendant. This action was brought after the period of employment had expired to recover the salary for the balance of the year. The defendant pleaded the former action in bar. When the case was here before (see Allen v. Colliery Engineers' Co., 196 Pa. St. 512, 46 Atl. 899—the corporate name of the defendant having since been changed to the International Text-book Company), it did not appear from the pleadings whether the former judgment was for an installment of salary or for damages for breach of contract. It was decided that if for the former, this action could be maintained, as in case of a wrongful discharge an employé may treat the contract

as existing and sue on it for his salary as it becomes due; but if for the latter, the judgment was a bar, as he can have but one action for damages for the breach of the contract.

At the second trial it was shown that the former judgment was for salary after the discharge, and the only question now properly before us is whether that judgment conclusively established the wrongfulness of the discharge and confined the defense to proof of payment or release or of facts in mitigation of damages. The rule on this subject, stated in Duchess of Kingston's Case, 20 How. St. Tr. 538: "The judgment of a court of concurrent jurisdiction, directly on the point, is as a plea a bar, or as evidence conclusive between the same parties on the same subject matter directly in question in another court," has been uniformly followed in our cases from Hibshman v. Dulleban, 4 Watts, 183, to Bell v. Allegheny County, 184 Pa. St. 296, 63 Am. St. Rep. 795, 39 Atl. 227. In Orr v. Mercer County Mut. Fire Ins. Co., 114 Pa. St. [583] 387, 6 Atl. 696, it was held that the confession of judgment in the common pleas on an appeal from a justice of the peace was conclusive against the right of the defendant to present the same defense in a subsequent action to recover other payments on the same contract.

The plaintiff rendered no services for the two weeks' salary for which he sued and recovered a judgment. His former action was in affirmance of the contract, and the judgment was on the ground that his discharge was wrongful. Proof that it was wrongful was essential to an adjudication in his favor. It was the foundation of his case, and having been once established in a court of competent jurisdiction in an action between the same parties and for the same subject matter, it could not again be inquired into.

The judgment is affirmed.

The Recovery of a Judgment by a Discharged Employé, in an action claiming wages for the month in which he was discharged, is conclusive of the fact that his wages were due and payable in monthly installments, and also estops the defendant from denying that he discharged the plaintiff without cause: Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426. See, in this connection, McMullan v. Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, and note.

PENNSYLVANIA RAILROAD COMPANY v. MIDVALE STEEL COMPANY.

[201 Pa. St. 624, 51 Atl. 313.]

RAILROADS—RULES FOR UNLOADING CARS.—A railroad has a right as a common carrier to make reasonable rules to speed the unloading of its cars as cars are for transportation and not for the storage of freight. (p. 837.)

RAILROADS—RULE FOR UNLOADING CARS.—A rule adopted by a railroad company that "a charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee, for each day, or part of day, after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car," is reasonable and enforceable. (p. 838.)

RAILROADS.—IF REGULATIONS OF RAILROADS as common carriers are obviously reasonable on their face, it is not necessary for the court to instruct the jury to find that fact. (p. 838.)

TRIAL.—An affidavit of defense not alleging specifically and at length the nature and character of the defense relied upon is insufficient. (pp. 838, 839.)

RAILROADS—RULES BINDING ON CONSIGNEE.—A consignee of goods impliedly contracts to submit to all reasonable rules for the regulation of shipments adopted by a railroad company, and the fact that the shipper was not consulted in framing such rules does not affect their validity. (p. 839.)

COMMON CARRIERS—FREIGHT AND DEMURRAGE.—There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying, or rules for demurrage. As to the one, it cannot exceed a lawful rate, and as to the other, it cannot exceed a reasonable charge. (p. 840.)

RAILROADS — DEMURRAGE — NOTICE OF RULE — DEFENSE.—A shipper cannot allege as a defense want of knowledge of a rule of a railroad company relating to demurrage on cars, when he has regularly received monthly bills for violation of such rule. (p. 840.)

E. J. Sellers and D. W. Sellers, for the appellant.

G. W. Pepper, for the appellees.

628 DEAN, J. The plaintiff, as a common carrier corporation, before 1893, adopted by its proper officers this rule: "A charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for

delivery to such consignee, for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car."

From July, 1893, up to December, 1898, the defendant, which is a large iron and steel manufacture at Nicetown in Philadelphia county, received from plaintiff, consigned to the steel company, about fourteen thousand cars laden with iron, coal and other products used in its manufacturing business. A large number of these cars were detained beyond the forty-eight hours, some for many days, before being unloaded. Plaintiff charged for the delay as provided by the rule quoted, and presented monthly bills for the same to defendant, which it refused to pay. In an affidavit of defense it denied the right to make the charge and consequently its liability to pay. Plaintiff then took a rule to show cause why judgment should not be entered for want of sufficient affidavit of defense. The aggregate of the charges within the years named was four thousand and forty-eight dollars. The learned President Judge Arnold, of the court below, in his opinion, discharging the rule, says: "Conceding that a carrier may charge a consignee a fixed rate in the nature of demurrage for the detention of its cars beyond a reasonable time for discharging their cargoes, and that the rate claimed in the present suit is a reasonable rate, yet there is sufficient denial of the facts upon which the plaintiff bases its claim to prevent the entry of a summary judgment, and, therefore, we discharge the rule for judgment for want of a sufficient affidavit of defense."

[629] From this decree plaintiff brings this appeal, arguing that the court erred in refusing to make the rule absolute.

The plaintiff has an unquestioned right as a common carrier to make reasonable rules to speed the unloading of its cars. Cars are for the transportation of freight, not for its storage. A rule on its face may apparently be unreasonable, either as to time allowed for unloading, or as to the extent of the penalty by which it is sought to enforce a reasonable time limit; or the reasonableness of the rule may be doubtful, in either of which cases the evidence would be for a jury. But no such question arises here, for the affidavit does not deny the reasonableness of this rule as applicable to others. It only denies, on other grounds, the right of plaintiff to apply it to these shipments. Where the rule is manifestly a reasonable one,

as this one is, both as to time and charge, the court will not take up time by instructing a jury to find the fact, any more than it would instruct a jury, on undisputed facts, to find that a collecting bank had protested a negotiable note within a reasonable time after nonpayment. Although the question has not been heretofore directly passed upon by this court, it has been decided in several of the states: Miller v. Mansfield, 112 Mass. 260; Norfolk etc. R. R. Co. v. Adams, 90 Va. 393, 44 Am. St. Rep. 916, 18 S. E. 673; Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, and other cases.

As before noticed, with the plaintiff's statement is filed a complete copy of its account, giving car initials, number, contents, exact hour of arrival, date of release, number of days detained, and amount of charge. None of the cars charged for were kept less than three days, and many of them from seven to twenty-one days. So far as it was in the power of a railroad company to give notice to a consignee of every material fact, the defendant got this notice from plaintiff when the bills were rendered. Wherein does the affidavit make an issue of fact which ought to go to a jury? It sets out that the demurrage rule is not applicable to it, because large numbers of the cars consigned to it were unloaded promptly, but being reloaded as outgoing shipments, the detention caused by reloading is embraced in a charge of delay in unloading. The plaintiff having sworn to its detailed statement, having positively [630] averred the number, date of arrival and date of release, as to every car, it was the duty of the defendant to meet this charge, by specifying the cars detained for other reasons than by neglect to unload. The least error in plaintiff's account, whether overcharge as to delay, mistake in car, or consignment to defendant, when consigned to some other, could easily have been detected and exposed in the affidavit of defense. Every delay occasioned, not by unloading but by reloading, could have been particularly averred. We do not say that if defendant had been unable to do this, either by neglect to keep accounts or by their loss or destruction, that the court below might not, under the circumstances, have refrained from entering judgment. But the defendant makes no averment of inability to produce accounts which will specify the alleged errors in plaintiff's account; on the contrary it avers that "the defendant will produce at the trial its own records, carefully prepared under a system adapted to prevent error, for the pur-

pose of proving that the plaintiff's records are inadequate as a basis of claim." It thus asserts that it has in its possession accurate accounts which at the trial in the court before a jury will defeat plaintiff's claim in part at least; yet, with seeming caution, it refrains from specifying the particulars then before it. This defeats the very purpose of the affidavit of defense law. Its object was to hasten final judgment by setting out in the affidavit the groundlessness of the whole or part of plaintiff's claim, or by averring that it had been paid, and how, in whole or in part. The parties might then, in that early stage of the proceedings, be brought together; the plaintiff might abandon his claim in whole or in part. This affidavit specifies nothing in answer to plaintiff's full and complete specifications.

Every averment is an inference from a "carefully prepared" system of bookkeeping of its own, without a copy of the particulars which would demonstrate the errors of plaintiff's charges. "The affidavit should state specifically and at length the nature and character of the defense relied on": Bryar v. Harrison, 37 Pa. St. 233. "The spirit of the affidavit of defense law abhors evasion and equivocation, and punishes them by entering judgment": Endlich on Affidavits of Defense, sec. 377; Woods v. Watkins, 40 Pa. St. 458.

The further objection to plaintiff's claim is, that it does not
631 aver, expressly or impliedly, that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then, further, it is averred that since the demurrage rule was adopted, it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity: Kentucky Wagon Co. v. Ohio etc. Ry. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. As to the one, it cannot exceed a lawful rate; as to the other, it cannot exceed a reasonable charge. Within these bounds, it is presumed, in the interests of its stockholders and the public, to properly conduct its own business. The defendant further avers in its affidavit that "prior to 1893, or at any time subsequent thereto," it had no

knowledge that plaintiff had established a rule relating to the demurrage charges set forth in its statement, and that no notice of such rule was ever communicated prior to the bringing of this suit; but then it says: "At various times during the year 1893, and subsequently, bills have been rendered to the defendant by plaintiff for demurrage charges, but said bills did not contain notice of any regulation or rule, on which said charges were or could be based, nor were the charges in said bills consistent with the terms of the regulations upon which the plaintiff has declared." This is inconsistent and evasive both in language and substance. That plaintiff did adopt such rule is clearly shown by its uniform charges. It was not bound to serve a verbatim copy of the rule on defendant; that could have shown nothing so specifically as the charge, which plainly says, what detention is allowed, what excess is charged, on what car and on what goods. And that defendant had full knowledge is shown by its own admission, that bills for violation of the rule were regularly rendered. We think this affidavit falls short of what the law calls sufficient. It raises no issue of fact calling for the intervention of a jury, and the law is clearly with the plaintiff.

Therefore, the decree discharging the rule is reversed and 632 the record is remitted to the court below, with directions to enter judgment for plaintiff, unless other legal or equitable cause be shown to the court below why such judgment should not be entered.

Demurrage.—A charge by a railroad company against a consignee of one dollar a car for every day it remains unloaded after notice of its arrival, and the lapse of three days, is reasonable and valid: Norfolk etc. R. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 44 Am. St. Rep. 916, and monographic note on the right to make and collect charges for the detention of cars by consignees.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA.

SANDERSON v. PANTHER LUMBER COMPANY.

[50 W. Va. 42, 40 S. E. 368.]

MASTER AND SERVANT—FELLOW-SERVANTS.—An employé traveling over his master's railroad on the business of the latter and at his instance and request, without paying fare, is a fellow-servant with the employés of the same master operating the train, and not a passenger, and as such accepts the risks growing out of the condition and nature of the train and track known to him, and the negligence of his fellow-servants engaged in operating the train. (pp. 842, 844.)

MASTER AND SERVANT—RISKS ASSUMED.—An employé assumes not only the risks arising from the negligence of his fellow-servants, but also those arising out of the negligence of his master, if he accepts, or continues in, the service after knowledge of such negligence. (p. 845.)

Rucker, Keller & Anderson, for the plaintiff in error.

Henry & Graham, Chapman & Gillespie, and Flournoy, Price & Smith, for the defendant in error.

[42] DENT, J. The Panther Lumber Company obtained a writ of error to a judgment against it on the verdict of a jury for the sum of thirteen hundred and twenty-five dollars rendered by the circuit court of McDowell county at the suit of James Sanderson, [43] on the tenth day of May, 1900. The facts are as follows, to wit: The plaintiff was foreman of the lumber camp of the defendant, engaged in the lumber business. As such it was his duty to superintend the cutting of the timber, getting it out of the woods and loading on the cars at the lumber camp. The defendant operated a railroad eight or nine miles long for the purpose of transporting logs from the camp

to the mill. The plaintiff, by permission or direction of the defendant, was in the habit of riding on the log train whenever the business of the company required his presence at the office of the company located at the mills. Plaintiff, needing feed for the horses under his charge, got on a loaded train for the purpose of going to the mills to see about obtaining the feed. A part of the train left the track near a place called the mud hole. Plaintiff jumped to save himself, but a log struck him, knocked him down and he suffered the injury for which he sues, consisting of a broken ankle and other wounds and bruises. Some little attempt is made to show that the Panther Railroad Company should have been made defendant instead of the Panther Lumber Company. The evidence by decided weight and preponderance shows that the Panther Lumber Company is the real Dr. Jekyll while the Panther Railroad Company is only Mr. Hyde, and the jury made no mistake in so finding. This matter must be considered out of the controversy.

This case depends greatly on the question as to whether the plaintiff is to be treated as a passenger on the train for fare, express or implied, or an employé engaged about his master's business and traveling on the train for the convenience of such business. If in the former capacity, he assumed neither the risks of the master's negligence nor of the servants operating the train, and as there is evidence tending to show both, the verdict could not be disturbed unless contrary to the plain preponderance of the evidence which in such event does not exist, and the judgment would have to be affirmed.

The evidence does not show the plaintiff to have been a passenger traveling over the road for his own convenience for fare, express or implied. On the contrary, it shows that he was an employé traveling over the road on his master's business at the instance of the master, without fare. "The presumption that a person on a train is a passenger does not prevail in cases where [44] the train is one on which passengers are not ordinarily carried, as, for instance, a construction train, or an oil train, or the like." "As to whether an employé riding on a train is a passenger, there is some conflict, but the rule seems to be that if he is being carried to and from his working place, he is not a passenger, but if he is carried for his own convenience or business, he is a passenger": 4 Elliott on Railroads, secs. 1578, 1582. "One may be both a passenger and an employé of a railroad company; an employé when passing over the road at a time when actually engaged in performing duties

for the company, but a passenger while not so engaged but riding from one place to another, even though continuing all the while in a popular sense in the employment of the company": 5 Am. & Eng. Ency. of Law, 516.

The plaintiff's counsel insist in their argument that plaintiff was required to ride on the cars while engaged in the defendant's business. According to the foregoing authorities this makes him a fellow-servant with the engineer and not a passenger. The fact that he was on the cars in discharge of duties he owed to defendant gives rise to fellow-servancy, while it might have been otherwise had he been there traveling about his own business with permission of the defendant: Gilshannon v. Stony Brook R. R. Corps., 10 Cush. 229; O'Brien v. Boston etc. R. R. Co., 138 Mass. 387, 52 Am. Rep. 279; Russell v. Hudson River R. R. Co., 17 N. Y. 134; Albion Lumber Co. v. De Nobra, 72 Fed. 739. In this latter case De Nobra was traveling about his own business instead of the company's and was held to be to a certain extent a quasi passenger, though not for fare: McQueen v. Central Branch etc. R. R. Co., 30 Kan. 689, 1 Pac. 139; Kansas Pac. Ry. Co. v. Salmon, 11 Kan. 83; McDaniel v. Highland Ave. etc. R. R. Co., 90 Ala. 64, 8 South. 41; Rosenbaum v. St. Paul R. R. Co., 38 Minn. 173, 8 Am. St. Rep. 653, 36 N. W. 447. From these authorities by his admission the plaintiff must be regarded as an employé and not as a passenger when he was injured. According to the plaintiff's admission in his testimony it was a part of his duty to travel on the log train from the lumber camp to the mill on the master's business, and he was in the discharge of this duty when he was hurt. In accepting service in this employment, there are two classes of risks that he assumed.

1. The appliances or means and method of work. For if the machinery and appliances are such as can with reasonable care be used without danger to the employé, it is all that can be required of the employer: Seldomridge v. Chesapeake etc. Ry. Co., 46 W. Va. 569, 33 S. E. 293.

45 2. The negligence of his coemployés or fellow-servants. "All servants engaged in the common service of the same master in conducting and carrying on the same general business in which the usual instrumentalities are employed are fellow-servants. A proper test of this rule is whether the negligence of the one is likely to occur and inflict injury on the other" Jackson v. Norfolk etc. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258. This plaintiff, knowing that in the discharge of his

duty it would be necessary to travel on the log train in accepting his employment, accepted the risks attendant thereon, both as to the condition and nature of the train and track, and the negligence of his fellow-servants engaged in operating such train. He knew it was not a passenger train or road, but a log train or road, built and used for the purpose of conveying logs from the camp to the mills. Hence, he could not complain that it was not in the condition of a first-class passenger road, for the master could not afford to make it such for his benefit alone. When he entered on the cars he fully knew the condition of the road as well as the master, and he must be held to have assumed the risk thereof. So the condition of the track cannot and should not have anything to do with the determination of this case, especially as the plaintiff admits that it was the negligence of the engineer in reckless management of the train and engine, owing to bad temper, that caused the accident. Knowledge of the defect in the engineer's power to properly control his temper was not brought home to the defendant, nor the defect in the sand pipe or want of sand. Hence, the defendant could not be held liable by reason of these things, for it was not shown that it was guilty of negligence with regard thereto. From the evidence of the plaintiff it appears that if the machinery and appliances had been used with reasonable care on the part of the engineer, the accident would not have happened. The engineer insists on the other hand that owing to the cold weather and snow the track was sweating and slippery, so that he was unable to control the train. In neither case does there appear to be any liability against the defendant. For if it was occasioned by the unknown recklessness of the engineer, the master is not liable; if it was occasioned from the want of sand by neglect of the engineer, the master is not liable, and if it was occasioned by a recent defect in the sand pipes of which the master had no knowledge, it is not liable, and if it was occasioned [46] by the slippery condition of the rails, which neither the engineer nor master by the use of ordinary diligence could foresee, and of which the plaintiff had equal knowledge, the master is not liable. No negligent act beyond the plaintiff's assumed risk appears from the evidence to have been brought home to the defendant.

The following instructions were given in behalf of plaintiff:

(No. 1.) The court instructs the jury that it was the duty of the defendant company to use due and proper care to so construct, maintain and equip its railroad and engines used

thereon, so that the plaintiff could be safely carried thereon whenever it became his right or duty to ride thereon, and if you believe from the evidence that the defendant company did not use due and proper care in the construction of its road and equipment of its engine, and that such failure on the part of the defendant was the proximate cause of the injury complained of, then you should find for the plaintiff.

(No. 2.) The court instructs the jury that if you believe from the evidence that the proximate cause of the injury to the plaintiff was the concurring negligence of the defendant company and a fellow-servant of the plaintiff, then you should find for the plaintiff.

(No. 3.) The court instructs the jury that while a servant entering the service of the master assumes the ordinary risk incident to the service, yet the negligence of the master is not one of those risks.

None of these instructions were proper in this case, for they all disregard the risks assumed by the plaintiff. For if the plaintiff is aware of negligence on the part of the master in the conduct of his business, he assumes the risk of such negligence in either accepting or continuing in such business: Seldomridge v. Chesapeake etc. Ry. Co., 46 W. Va. 569, 33 S. E. 293.

The defense in this case is that if there was negligence on the part of the master in conducting its business, plaintiff was fully aware of such negligence prior to the accident, and assumed the risk thereof, and this is entirely ignored in each of these instructions: McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648.

47 The first instruction asked by the defendant, which is in these words, "The court instructs the jury to find for the defendant," should have been given, for there is no evidence in the case proving or tending to prove any act of negligence on the part of the defendant, of which the plaintiff did not have notice and did not assume the risk, and if the accident was caused by the slippery condition of the track, neglect of duty or the reckless running of the train on the part of the engineer, of which the defendant had no notice in time to prevent, the defendant is not liable, and the circuit court should have so instructed the jury.

This ends this case. The judgment is reversed, the verdict of the jury set aside, and a new trial is awarded.

Fellow-servants.—Persons in the employ of the same master, engaged in the same common work, and performing the services for the same general purpose, are fellow-servants. They need not be engaged in the same particular work: Spees v. Boggs, 198 Pa. St.

112, 82 Am. St. Rep. 792, 47 Atl. 875. Whether one servant is the fellow-servant of another does not depend upon their respective grade or rank, but upon the nature of the services being performed: Wiskie v. Montello Granite Co., 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; monographic note to Mast v. Kern, 75 Am. St. Rep. 587-589. As to whether an employé riding free on the vehicle or train of his employer is a fellow-servant or a passenger, see Bowles v. Indiana Ry. Co., 27 Ind. App. 672, 87 Am. St. Rep. 279, and authorities cited in the cross-reference note thereto, 62 N. E. 94. The subject of fellow-servants in general is considered in the monographic notes to Fisk v. Central Pac. R. R. Co., 1 Am. St. Rep. 32, 33; Fox v. Sandford, 67 Am. Dec. 588-597.

STATE v. YOUNG.

[50 W. Va. 96, 40 S. E. 334.]

HOMICIDE—KILLING BYSTANDER.—MALICIOUSLY TO FIRE A GUN into a crowd, regardless of consequences, is murder in the first degree, if death results to an innocent bystander therefrom. (p. 848.)

CRIMINAL LAW—PRESENCE OF PRISONER.—An order of suspension entered on motion of the accused after trial, judgment, and sentence, does not vitiate such prior proceedings, although the order of suspension fails to show the presence of the prisoner in person at the time it was entered. (p. 849.)

R. R. Smith and W. L. Taylor, for the plaintiff in error.

E. P. Rucker, attorney general, and L. C. Anderson, for the state.

97 DENT, J. Lewis Young, at the April term, 1900, of the circuit court of McDowell county, was sentenced to be hanged on the thirtieth day of August, 1900, for the murder of Anthony Kell, of which he stood convicted. He obtained a writ of error to this court, and now here insists that the judgment be reversed, the verdict of the jury be set aside, and he granted a new trial: 1. Because of the admission of improper testimony; and 2. Because the verdict is contrary to the law and evidence, and without evidence to support it.

He objects to the evidence of Lum Whitlock relating to a difficulty had with said Whitlock shortly before the fatal shooting. This whole matter, except some minor details, was already before the jury by the testimony of other witnesses, and it was proper as bearing on the animus of the prisoner at the time of the shooting. He also objects to the testimony of C. E. Harman with regard to the bullet that produced the fatal wound, for the

reason that the bullet was not introduced in evidence. The bullet was produced before the court and jury, and while not formally put in evidence, yet it was treated as if in evidence. Hence, the objection is without substantial foundation.

The main reliance is on the insufficiency of the evidence to support the verdict.

The prisoner testified that the gun in his hands was accidentally discharged, without any intention on his part to shoot or hurt anyone. There is much evidence to the contrary, and the jury found against him on this question. It may, therefore, be considered out of the case. The material facts in the case are as follows: The prisoner had a difficulty with one Lum Whitlock about a girl, and followed him into a barber-shop, threatening to kill him. He had a pistol and some other person got hold of him and took it from him. He pulled out another pistol and Whitlock hit him over the head with a beer bottle. Whitlock was then pushed out of the barber-shop, and Young, full of profanity and anger, fired the pistol off, but hit no one. He then went to his home and obtained a Winchester rifle. He came up [98] the street, where there was a considerable crowd gathered, and said, "I am going to kill some God damned son of a bitch." Some of the bystanders tried to persuade him to give up the gun, that Whitlock was gone. He said that he would not do it, that "the damned niggers had beat him up, and he would not stand it—before he would stand it he would rather be dead and in hell," that "they had beat him up and treated him wrong, and he would kill some son of a bitch that night." He then told the crowd to stand back and fired, hitting and killing Anthony Kell, a bystander. It was shown that there was no ill-feeling between the prisoner and Kell, but that they were good friends.

It is insisted that the verdict of murder in the first degree is not sustained by the evidence, for the reason that it fails to show malice or an intention to kill, and the shooting was done while the prisoner was in a fit of anger from having been mistreated by Whitlock and others. That he had had no time to cool off, and the shooting was done in hot blood under great provocation.

The evidence shows that the prisoner was the aggressor in the first instance, and brought the trouble all on himself against the persuasion and interference of his friends. He had opportunity to cool off when he went for his Winchester. On returning, without provocation and with perfect indifference as to the

result, and while his friends were trying to persuade him to do otherwise, with vile words on his lips he fired his gun off into the crowded street and killed an entirely innocent person lawfully in the street. In the case of State v. Douglass, 28 W. Va. 300, Judge Johnson says: "If a father with such a depraved heart should shoot into a crowd of persons and kill his own son, he would be guilty of murder, although he might love his son dearly and there was no unfriendly feeling between them." Malice need not be directed against the deceased, but it is that malevolence which comes from a depraved heart "regardless of social duty and fatally bent on mischief." The whole conduct of the prisoner on this occasion shows that he had a wicked, depraved and malignant heart, and regardless of the law and his duty to his fellow-man, he was determined to vent his diabolism on a hapless victim that might come in his way. He recklessly fired his gun in the crowd, not caring who might suffer from it. A more wicked and malicious act could hardly be conceived. The fact that an innocent man was the victim of his unlawful 99 conduct makes his act the more reprehensible, for it is entirely beyond the bounds of palliation or excuse. Maliciously to fire into a crowd regardless of consequences is murder if death results therefrom: Wharton on Homicide, 2d ed., sec. 52; Golliher v. Commonwealth, 2 Duvall, 163, 87 Am. Dec. 493; State v. Smith, 2 Strob. 77, 47 Am. Dec. 489.

It is insisted on argument that while it is murder, it does not come under the definition of murder in the first degree under section 1, chapter 144 of the code, which is as follows: "Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate and premeditated killing, or in the commission of or attempt to commit arson, rape, robbery or burglary, is murder in the first degree." According to the finding of the jury in this case the killing was willful, deliberate and premeditated. The prisoner, unprovoked, against the earnest protestation of friends, with the deliberate avowal to kill some one, fired his gun regardless of consequences in the crowd with deadly effect. The prisoner's whole conduct from beginning to end of the difficulty exhibits not one redeeming feature, but shows that he was a depraved, wicked creature, with no regard for law or his fellow-men—a willing victim of a lawless disposition. While his depravity may excite Christian sympathies, the law furnishes him no excuse therefor, but condemns him to death for that very depravity. Life for life is its demand, not alone that it may be vindicated and the criminal punished, but

for the protection of society and a warning to others suffering from a like depravity.

The fact that the order of suspension entered at the instance of the prisoner after judgment and sentence does not show that the prisoner was present at the time such order was entered, could in any event only affect such order, and could not possibly vitiate the prior trial, judgment and sentence.

An impartial jury after a careful investigation of the facts and a patient hearing of all the prisoner could present in his defense found no circumstances of mitigation in his favor, but adjudged him guilty of a degree of crime punishable by death. The presiding judge confirmed this finding and sentenced him accordingly. The circuit court on examination could find no error in the judgment. The record discloses none to this court. The law must, therefore, be permitted to take its course.

The judgment is affirmed.

Homicide.—If a person recklessly discharges a gun at another, or if he recklessly discharges it into a crowd at no particular person, and death results to some one, such killing is murder: Austin v. State, 110 Ga. 748, 78 Am. St. Rep. 134, 36 S. E. 52; Golliher v. Commonwealth, 2 Duvall, 163, 87 Am. Dec. 493.

ROHRBOUGH v. UNITED STATES EXPRESS CO.

[50 W. Va. 148, 40 S. E. 398.]

JURISDICTION, DEFECTS WAIVED BY APPEAL.—An appeal by a party in a justice's court operates as an appearance, and waives irregularities in the summons and proceedings. (p. 851.)

APPELLATE PRACTICE.—ON REVIEWING JUDGMENTS in cases tried by the court without a jury, the appellate court treats them as standing on demurrers to the evidence. (p. 852.)

AGENCY—IMPLIED POWERS.—If an agent is commissioned to do any act, nothing being said as to the mode of performance, he has implied power to perform his duties in accordance with any recognized usage or mode of dealing. (p. 853.)

AGENCY—POWER OF AGENT TO EMPLOY SUBAGENT. An agent has no power to delegate his agency to another, or to sublet it, but may employ clerks or subagents, whose acts, if done in his name, and recognized by him, either specially or according to his usual mode of dealing with them, are regarded as his acts, and as such binding on his principal. (p. 854.)

AGENCY—PRINCIPAL, WHEN BOUND.—A principal is bound by the acts of his agent, whether general or special, within the authority he has actually given him, including not only the precise act expressly authorized, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is bound by the acts of the agent within the apparent authority which the principal knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. (p. 855.)

AGENCY—DISREGARD OF INSTRUCTIONS—PRINCIPAL, WHEN BOUND.—If an agent disregards specific instructions as to the mode of executing his powers, his acts are, nevertheless, binding upon his principal as regards third parties having no notice of such instructions in respect to a matter as to which the agent is held out to the public as having full authority. (p. 855.)

AGENCY.—POWERS OF AGENTS MUST BE EXERCISED FOR THE BENEFIT OF THEIR PRINCIPALS only and not of themselves or third persons; and if the agent acts otherwise, with the knowledge and consent of the person relying upon his unauthorized act, the principal is not bound. (pp. 856, 857.)

AGENCY—ACTS OF SUBAGENTS OUTSIDE POWER OF AGENT.—If an agent of an express company intrusts to another, not in the employ of the company, and without its knowledge, the transaction of its business under his control, and such subagent solicits and receives money deposits in exchange for money orders of the company issued by him without payment of the usual fees, and absconds with the money, a depositor, knowing that the issue of such money order is beyond the power of the agent for whom the subagent professes to act, cannot recover thereon from the express company. (pp. 857, 858.)

A. G. Dayton and F. O. Blue, for the plaintiff in error.

M. Peck, for the defendant in error.

150 POFFENBARGER, J. This is an action brought by A. F. Rohrbough against the United States Express Company before a justice of the peace of Barbour county in July, 1898, for the recovery of two hundred dollars, the amount of four fifty dollar express money orders, alleged to have been issued by said company at its office in Belington in said county and five dollars protest fees on the same. The summons is as follows:

"To any constable of Barbour county, greeting:

"You are hereby commanded in the name of the state of West Virginia to summon the United States Express Company to appear before me, or some other justice of said county, at my office in Philippi, in Philippi district, on the eleventh day of July, 1898, at 10 o'clock A. M., to answer the complaint of A. F. Rohrbough in a civil action, for the recovery of money due by four express money orders of fifty dollars each and five dollars protest fees, in which the plaintiff will demand judgment for two hundred and five dollars and twenty cents, exclusive of interest and costs.

"Given under my hand this second of July, 1898.

"W. G. KEYS, J. P."

On the return day the defendant appeared specially and moved to quash the writ, which motion was overruled. The case was then continued for one week, and on the eighteenth day of

July the parties again appeared and the defendant filed pleas, verified by the oath of its agent, denying that the orders sued upon are the orders of the defendant. After hearing the evidence, the justice rendered a judgment in favor of the plaintiff for two hundred and six dollars and thirty cents. The defendant appealed and upon the trial in the circuit court, without a jury, the court found for the plaintiff and rendered judgment in his favor for the sum of two hundred and thirty-four dollars and fifty-three cents, being the amount of the judgment rendered by the justice with the interest and costs, until the time the appeal was taken, and damages as provided by law and the costs in the circuit court. The court having overruled the motion of the defendant to set aside the finding and judgment and grant a new trial, the defendant took a bill of exception containing the evidence as certified by the court, and, upon its petition, a writ of error was allowed.

In Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716, this court holds that a [151] misnomer in a justice's summons is amendable, and is waived and cured by appearance and appeal in the action. In Thorn v. Thorn, 47 W. Va. 4, 34 S. E. 759, this court decided that "an appeal by a party to a cause in a justice's court operates as an appearance, and, as a general rule, the irregularities in the proceedings before the justice are waived by an appeal." In view of these principles the assignment of error, based upon the overruling the motion to quash the writ, appears to be not well taken.

The evidence shows that the express company had its office in the railway station building at Belington, and J. V. L. Thrall was the agent of said company and also of the Adams Express Company, and of the Baltimore and Ohio Railroad Company, and the West Virginia Central and Pittsburg Railroad Company. There were three other men working in the office—Darl Elliott, J. M. Parsons and —— Scroll. Scroll was a telegraph operator, employed by the West Virginia Central and Pittsburg Railroad Company, and "a general helper in the office," and attended to the express business for Thrall. He issued money orders and signed Thrall's name to them in the space provided on the orders for countersigning them. The instructions and rules of the company required the agent in countersigning money orders to subscribe his name personally, but in this instance Thrall had permitted Scroll to attend to the business for probably a year and to sign his name. The evidence does not show that the company had any knowledge of the fact that its business was being so transacted at that place.

On the tenth day of June, 1898, the plaintiff deposited two hundred dollars at the office at Belington, and took the four money orders in question in lieu thereof, intending to send them to the bank at Grafton. Scroll received the money and issued the orders, signing Thrall's name. Whether Scroll ever put the money into the safe or the money drawer of the company is not known, but on the next day he disappeared and the money in question, as well as considerable other money obtained in the same way, disappeared also. It seems that he reported about the time he left that the office had been robbed. The rate of charges printed on each money order was eighteen cents, making seventy-two cents on the four orders in question. This Scroll did not collect, and Rohrbough says he had frequently purchased money orders there and that Scroll had never charged him any fees on them.

Upon this state of facts the defendant insists that it is not liable for the amount claimed upon the orders, and relies upon [152] the principles of law holding that power conferred upon an agent is based upon the special confidence or trust which the principal has in the agent's ability or integrity, and that such power or authority, express or implied, cannot be delegated by the agent so as to bind the principal: 1 Am. & Eng. Ency. of Law, 972. A further contention is that because the fees were not charged and collected, the act of Scroll in issuing the orders was not the act of Thrall, the agent, or the act of the company, even if Thrall could have delegated his authority, and also that the express company is not responsible for the appearance of authority on the part of Scroll caused by Thrall permitting him to attend to his business, for the reason that the company had no notice of the fact that he was so acting. In support of this, 1 American and English Encyclopedia of Law, second edition, 900, is cited. Another contention is that it was the duty of Rohrbough to ascertain the extent of the agent's power and authority in dealing with him, and as bearing upon these propositions, a number of cases are cited, including Curry v. Hale, 15 W. Va. 867; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540; Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555.

In reviewing a case tried by the court in lieu of a jury, the appellate court treats it as standing on a demurrer to the evidence: State v. Miller, 26 W. Va. 106. In determining whether there is sufficient evidence to sustain the finding and judgment, it becomes necessary to ascertain the general principles of law governing cases of this kind.

"An agent who has a bare power or authority must execute it himself, and can delegate his authority to no other": 1 Am. & Eng. Ency. of Law, 368. But there is another principle of law laid down in Titus v. Cairo etc. R. R. Co., 46 N. J. L. 398, which allows some latitude to agents of that class, and materially qualifies and restricts the general proposition. Where a known usage of trade justifies, or necessity requires, the employment of subagents, such agents may be employed, but only to perform ministerial acts. The agent himself must determine by his own judgment and discretion what should be done, and he may then authorize persons to carry into effect the purposes of his employment. He cannot, however, turn his principal's business over to the judgment and discretion of another and bind his principal by the acts and conduct of the latter. "The agent is bound to follow faithfully the instruction of his principal, and act within the scope of his authority": 1 Am. & Eng. Ency. of Law, 369. But [153] this rule has its qualification also. "Where a deviation from the strict performance of his authority is due to necessity or unforeseen emergencies which are themselves not due to the agent's default," the rule must yield. And "where the agent is commissioned to do any act, nothing being said as to the mode of performance, he will have an implied power to perform his duties in accordance with any recognized usage or mode of dealing": 1 Am. & Eng. Ency. of Law, 370, 371. This court lays down the following proposition with reference to insurance agents, whose duties are very similar to those of express companies, in point 7 of the syllabus in Deitz v. Providence etc. Ins. Co., 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50: "No insurance agent can be expected by his company to attend to all the details of his business in person; the company must and should be construed to anticipate the employment of clerks to attend to the office, when the agent is absent or sick; when the agent's clerk is authorized and intrusted to examine property, and write out a policy thereon, his contract and knowledge are the contract and knowledge of the agent, and any accidental mistake which he may make is the mistake of the agent, and will be corrected in a court of law in an action on the policy."

A general proposition of law laid down in 1 American and English Encyclopedia of Law, second edition, 978, and well supported by decided cases, is that "when an agent is engaged to perform acts of a purely ministerial or mechanical character, or acts which do not call for the exercise of judgment, discretion or skill, in respect to acts other than such as are ministerial,

There are, however, other facts to be considered. Rohrbough says Scroll charged him no fees on the money orders, and that he had been in the habit of obtaining them at that office from Scroll without paying fees. He was a merchant and deputy sheriff of the county and did his banking business at Grafton, and sent his remittances there in the form of United States express money orders. He further says Scroll had been in the habit of coming to him and asking him to send his money in that way, and whenever he wanted to send money to the bank to give it to him (Scroll) and take an express money order for it. Scroll did this on several occasions, and just before the orders in question were issued, probably the day before, Scroll went to Rohrbough and [156] asked him what amount of money orders he could take, and was informed that he could take three hundred and eighty-five dollars' worth. On the next morning Rohrbough went to the office and obtained the orders sued on here, but as to the other one hundred and eighty-five dollars the evidence is not clear. Whether orders for that sum were issued does not appear, but it is referred to in that connection in the evidence.

Counsel for plaintiff in error insist that as this transaction was not for the benefit of the company, no fees having been paid, the act is not binding upon the company, and would not have been if it had been performed by Thrall himself, the duly appointed agent of the company. In this connection Stainback v. Bank of Virginia, 11 Gratt. 269, and other similar cases are relied upon, but they are not exactly in point. In Stainback v. Bank of Virginia, 11 Gratt. 269, the agent had a power of attorney to draw, indorse, and accept bills, and to make and indorse notes negotiable at a particular bank, in the name of his principal, and, having such authority, he indorsed a bill in the name of his principal for the benefit of himself. In North River Bank v. Aymar, 3 Hill, 262, the agent having power to indorse promissory notes, bills of exchange and drafts for his principal, indorsed notes for the accommodation of another firm. In Stainer v. Tysen, 3 Hill, 279, the agent had authority to draw and indorse checks, notes and bills of exchange in the name of his principal, but made and delivered the note in question in the name of his principal in compromise and satisfaction of a debt of his own. The cases, therefore, are very different from the one under consideration. There is a general principle of law, however, which requires the act of the agent to be for the benefit of his principal: 1 Am. & Eng. Ency. of Law, 2d ed., 1032, 1034. In Adams Express Co. v. Trego, 35

Md. 47, the court said: "It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal only and not of the agent or third parties. A power to do all acts that the principal could do, or all acts of a certain description for and in the name of the principal, is limited to the doing of them for the use and benefit of the principal only as much as if it were so expressed." But the circumstances of that case are very different from those of the case in hand. The point settled there was that an agent of the company has no right to engage in and carry on a business in competition with that which he had been employed to foster and [157] promote. However, Rohrbough did not put himself within the condition necessary to establish a duty or obligation on the part of the company toward him. Why should it transmit his money to Grafton, taking the risk of loss, without any compensation whatever? The fact that such orders had been issued to him without the payment of fees, and the further fact that Scroll was in the habit of coming to him and inviting him to turn his money over to him in exchange for such orders, are circumstances well calculated to impress upon him the fact that Scroll, in some way, or by some means, was transacting that business, not in the interest of the company, but in the interest of himself or some other person. It must have been apparent to him that the agent had no authority to make such a contract on behalf of his principal. The express company, like every other business institution, takes upon itself risks and responsibilities, not for the mere accommodation of the people, but for profit, and that profit arises from its charges for transporting such articles as are committed to it for that purpose. In issuing orders purporting to bind the company to transport money, without receiving or charging any compensation for the service, the agent (and the act of Scroll was the act of the agent, if he authorized it), with the knowledge of Rohrbough, acted in excess of his authority and beyond its scope. If Rohrbough had not been a party to the transaction and had not known that the agent was acting in excess of his powers, he might hold the company responsible to him. But he was a party to it, and did know of the failure of the agent to act within the limits of his powers. Had these orders passed into the hands of a third party, who knew nothing of these circumstances, the case would be on a different footing, but it comes here as a matter between the original parties, and must be settled upon the principles of law governing their conduct and fixing the status of the matter between them. As has been intimated, Rohr-

bough had knowledge of conduct on the part of Scroll, which was well calculated to arouse a suspicion on the part of any ordinarily prudent man, and sufficient to deter him from transacting any business with him. He must have regarded as unusual, and as importing infidelity to the company, the conduct of Scroll in coming to him repeatedly and soliciting him to turn over money to him in exchange for orders of the company, without requiring payment of the ordinary charges thereon. It does not appear that Thrall, the agent, knew anything of this misconduct on [158] the part of Scroll, and Rohrbough seems to be the only one of the interested parties who did not know anything about it.

For these reasons the judgment of the circuit court is erroneous. The evidence is not sufficient to sustain its finding and judgment, and as the principles governing cases which stand in the court on demurrer to evidence apply here, the judgment must be reversed, and judgment for the defendant must be entered.

BRANNON, P. I do not think that the company is liable for Scroll's acts.

Subagents.—While an agent may employ others to assist him in the purely ministerial and unimportant details of his employment, he cannot, as a rule, employ subagents to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is the very bottom of the employment: Kohl v. Beach, 107 Wis. 409, 81 Am. St. Rep. 849, 83 N. W. 657; McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79, 34 S. E. 111; monographic note to Davis v. King, 50 Am. St. Rep. 112, on subagents and their relation to the principal and to the agent appointing them. An insurance agent with power to sign and issue policies and to collect premiums, who hires a subagent and permits him to sign and deliver policies and collect premiums, is liable to the insurance company for the act of the subagent in issuing a policy and collecting the premium, without the actual knowledge of the agent, on property which he as agent for the company has been expressly forbidden to insure: Franklin etc. Ins. Co. v. Bradford, 201 Pa. St. 32, ante, p. 770, 50 Atl. 286.

CRUMRINE v. CRUMRINE.

[50 W. Va. 226, 40 S. E. 341.]

HUSBAND AND WIFE—WIFE'S FUNDS—PRESUMPTION.—Money of a wife received by her husband and with her knowledge and consent invested by him in land in his own name, is prima facie a gift from her to him. (p. 860.)

PARENT AND CHILD—INVESTMENT OF CHILD'S FUNDS—TRUSTS.—A father receiving money in trust for his children and investing it in land for their benefit, taking the title in his own name, thereby creates a trust in their favor. (p. 861.)

TRUSTS.—TRUSTEES ARE NEVER PRESUMED guilty of a breach of trust. (p. 861.)

TRUSTS—STATUTE OF LIMITATIONS.—Money received in express trust and invested in land by the trustee is held under the same character of trust, to which the statute of limitations does not apply, until the death or denial of the trust by the trustee. (p. 861.)

S. Robinson, B. F. Ayres, and Matheny & Pedigo, for the appellants.

J. V. Blair and M. K. Duty, for the appellees.

[226] DENT, J. Lorama Crumrine, now Lorama Duty, and John C. Crumrine, children of J. B. Crumrine and Jennie L. Crumrine, deceased, filed their bills in chancery in the circuit court of Ritchie county against Gussie M. Crumrine, widow of J. B. Crumrine, deceased, and her infant children, Jennie H. Crumrine, and George Crumrine, and others, for the purpose of having four certain properties, to wit, a tract of eighty-five and one-half acres, another tract of one hundred acres, a lot of one and one-fourth acres, and another lot of one acre, of which their father, J. B. Crumrine, died seised and possessed, to be declared to be held in [227] trust in favor of the plaintiffs. The circuit court decreed on final hearing of the cause that the one acre lot and the one hundred acre tract of land were so held in trust, but dismissed the bill as to the other two tracts.

The defendants appeal, and insist that the decree should have dismissed the bill without any relief to the plaintiffs. The plaintiffs now here admit that the decree is right as to the eighty-five and one-half acre tract, insist that it is right as to the one hundred acre tract and the one and one-fourth acre tract, but wrong as to the acre tract, which they claim should have also been decreed to them. This puts the eighty-five and one-half acre tract entirely out of the consideration in this case.

The one and one-fourth acres were purchased in 1872, and from the evidence it appears to have been paid for from money advanced to Jennie L. Crumrine, shortly after her marriage, by her father, John Collins. She willingly turned the money over to her husband, and he used it in paying for the property and took the deed in his own name. But the facts and circumstances indicate that it was with her knowledge and consent. Hence a prima facie presumption of a gift arises which the testimony has failed to overcome. Her confidence and trust in her husband at that time seem to have been perfect, without a cloud to darken the sky of their matrimonial happiness. There is no doubt but what she gave him the money with full faith in his proper disposition thereof for their comfort and felicity. She had no forebodings at this time as to the future. If she could have lifted the veil and have foreseen another in the full enjoyment of her rights and position, the natural jealousy of the human heart might have caused her to have made a different disposition of her patrimony, but an all-wise Providence for His all-wise purposes has seen fit to make of us short-sighted creatures with sanguine hopes to the length of our days, which may be few in number and full of trouble. The circuit court committed no error as to this lot: Berry v. Weidman, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817; 14 Am. & Eng. Ency. of Law, 580.

The conclusion reached by the circuit court as to the other two lots appears to have been fully justified by the evidence.

Mrs. Jennie L. Crumrine sold and conveyed her interest in her father's estate to her brother, Creed Collins, on the first day of January, 1874, for the sum of six thousand dollars, for which he gave his note payable to J. B. Crumrine and wife. Prior to her [228] death, which occurred on the 21st of January, 1876, the following payments had been made on such note to her husband, with undoubtedly her knowledge and consent, to wit: January 5, 1875, fourteen hundred and fifty-nine dollars and twenty-four cents; April 8, 1875, five hundred dollars; April 16, 1875, twenty-nine dollars and eleven cents. After her death, to wit, on the nineteenth day of April, 1879, he was paid the balance due, four thousand six hundred and forty-one dollars and forty-seven cents.

At common law a husband, being bound to support his wife, was entitled to all her property if it could be reduced to his possession during coverture. This has been changed by statute, so that now she receives all her property from whatever source free and acquit from the control and disposal of her husband, or liability for his debts. This, however, does not take away from her

the right to make gifts to her husband, nor was it intended to destroy the mutual confidence and trust that should always exist between man and wife, but it was to enable her to have untrammeled disposition of her own property free from his compulsion. As to moneys received by him prior to her death, the facts and circumstances, including her knowledge and consent, raise a prima facie presumption of gift which the evidence is insufficient to rebut. What her purpose and intention may have been as to the remainder of the money, when received, was terminated by her death, and although she permitted the note to be made to herself and husband, yet this was undoubtedly done in the expectation that they would both live to receive payment and enjoyment of the amount. The evidence shows that J. B. Crumrine perfectly understood the matter, and received the money in trust for the benefit of her children. By inheritance he was entitled to the one-third thereof, and the plaintiffs each to one-third. As to the hundred acre tract there can be no question, for he acknowledged at various times that the children's money purchased it, and he intended it for them, thus plainly creating an express trust therein for their benefit. As to the acre lot it is also shown that it was paid for with the money coming from his wife's estate. But it is argued that this may have been his own share that he invested therein, and that he used his children's portion in defraying the expense of his family or squandered and wasted it. The law never presumes a trustee guilty of a breach of trust, but always throws around him, if possible, 229 the presumption of honesty in all his dealings. It would, therefore, raise the presumption in his favor that in the discharge of his trust he invested his children's portion in the property where it would be held safe for them, and that he otherwise used his own share, as he had the right to do. To destroy this presumption, and injure the reputation of the deceased, devolves on those who would profit thereby. While counsel in argument would impeach the reputation for integrity of the deceased, neither the law nor the evidence sustains their contention. He received the money in trust for his children, invested for their benefit, though taking title in his own name, and always acknowledged and never denied the trust. In such a case, it is not necessary to raise an implied trust, but the trust is made express by the admissions of the trustee. To such a trust the statute of limitations would not apply until the trust was denied by the trustee or until his death: Wood v. Stevenson, 43 W. Va. 149, 27 S. E. 309. If the trustee put improvements on the property with his own funds, and thus commingled his funds

with those of his children, it devolves upon those claiming adversely to show this fact and separate the funds: Webb v. Bailey, 41 W. Va. 468, 23 S. E. 644.

The plaintiffs, being entitled to the property at the death of their father, are entitled to the rents and profits since accruing.

A careful consideration of the record in this case leads to the conclusion that the circuit court reached a determination just and fair to all the parties in interest, and one well worthy of compliment.

The decree is therefore affirmed.

If a Wife Voluntarily Delivers her money to her husband, the law presumes that he takes it as trustee for her, and not as a gift, even though there is not an express promise to repay: Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713; King v. King, 24 Ind. App. 598, 79 Am. St. Rep. 287, 57 N. E. 275. But see Clark v. Patterson, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589.

FLETCHER v. HICKMAN.

[50 W. Va. 244, 40 S. E. 371.]

PARENT AND CHILD—CONTRACT FOR CUSTODY OF CHILD.—A parent who contracts to commit the custody and maintenance of his child to a third person is bound by such contract after it is acted upon, unless the welfare of the child demands that the contract be disregarded. (p. 865.)

M. K. Duty and A. D. Ireland, for the appellant.

244 BRANNON, P. This case involves no difficult principles of law; but it does involve one of the saddest and most trying duties of the many sad and trying duties which fall upon judges. It is a contest between the father of two little children and the mother of their dead mother for their possession. Samuel G. Fletcher and Virginia, his wife, nee Hickman, were married on the 30th of December, 1891. They had three children, Curtis L., Lora and 245 Loring, the last two being twins. In July, 1899, the wife died. Shortly after her death these two children were committed to the custody of their grandmother, the mother of their mother, their mother being very much of an invalid from the birth of these twins. In fact, at the very birth of these twins one of them, Lora, was given to the grandmother by her parents. The grandmother took this child home with her and kept it some time. She took care of

the child for several weeks after its birth, while the grandmother remained at her daughter's home, taking care of the daughter, and shortly after the grandmother took the baby Lora to her home she was called back to her daughter to take care of her and her other child, both being very ill. She remained some time, then returned with Lora to her own home, leaving the other child with its mother at her request, as she said it would be company for her until her mother would come back. Very shortly after this the father himself went to the home of the grandmother, Sarah E. Hickman, and took with him the other child, Loring, and gave it to her to be taken care of. Afterward the mother and the children were taken to the home of Mrs. Hickman, where they stayed some time, when Mrs. Fletcher and one child returned to her own home, leaving the twins with the grandmother. In a few weeks Mrs. Hickman was called to the bedside of her daughter, and remained with her until she died. This is Mrs. Hickman's version under oath: "I was there when the children were born, and the mother was not able to take care of them. Their mother didn't know what to do with them, and asked me if I would take one of them, and I said I would if they would give me the child as long as I should live, and they both agreed. I said I would rather have writings, and he said he would raise his hand to God that he would never take the baby from me as long as I lived. I stayed until the children were five weeks old, and I took my baby and went home, and in a few days they sent for me to come and take care of them, as the other baby was sick. She said, 'Mother, I don't believe I will ever get well, and will not be able to raise my babies; will you take both these children and keep them? I said I would if they would make it so I could hold the children. Sam said, 'If you will take them, if you will save that sick baby, and if Stat [his wife] never gets well, they shall be yours as long as you live—as God is my judge I will never take either of them babies in your [246] life.' And I said I would take them. He said if Stat got well, I would have to give the little baby back. So I stayed all that winter, and then I brought his wife and children to my home, and stayed until fall, and then I stayed there that winter, and the next spring I brought his wife and family to my house, and they stayed until that fall, and then she got so poorly that I stayed all the time. There was never a soul slept with that Lora but myself, and this one, to the best of my knowledge, I was not away from her but six weeks. I had two bottles, and raised them on the bottles. I set up seven long weeks to take care of

this baby. I took care of the wife and children and all until she died. The day before she died she called me and Sam to the bed, and she said, 'Sam, will you promise me this: that you will never take my babies from my mother as long as she lives?' And he said he never would. She said, 'If I could know anything after I am dead, and knew any other person besides my mother had my babies, I could not rest in my grave.' She told us not to cry. She said, 'Sam, don't take my little babies from my mother,' and he said, 'I never will bother your mother as long as I live,' with tears rolling down his cheeks. How could he go back on the last words he spoke to his dying wife? She asked what time it was, and we told her. She said, 'I will soon be gone,' and that was the last words she spoke. She was in a sick chair, and when I see the breath was gone, I could not look any longer. And that is the way I come by these children." Mrs. Hickman took the two children, Lora and Loring, to her home, while the boy, Curtis, remained with his father. Some months after the wife's death, the father demanded the twins from Mrs. Hickman, and she refusing to surrender them, he sued out a habeas corpus from the circuit court of Ritchie county, against Mrs. Hickman, to compel her to surrender to him the twin children, and the circuit court rendered judgment compelling her to surrender them, and she has brought the case to this court by writ of error.

As by the old law, as well as by the rule still prevailing, in a general sense the father is the natural guardian of a child, and liable for its support, and he was entitled to its custody, even against the other author of its being, the mother, as a general rule. As between the father and mother the courts have in later days considerably mollified that old rule, so that now the right [247] of the father, over that of the mother, is not unqualified, but subject to the peculiar circumstances of the particular case, which are not pertinent here: State v. Smith, 20 Am. Dec. 324, and note; 9 Am. & Eng. Ency. of Law, 2d ed., 867; Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308. This is not a case between father and mother, and it is, therefore, more difficult to decide against the father. Still, as these children were only four years old when this habeas corpus was instituted, and as they had been raised from their birth by their grandmother, and knew no mother save her, her plea is almost as strong as that of the real mother. But there is a factor in this case which frees it from the perplexing hesitation which would afflict a judge were he deciding between

the father and grandmother without that factor. That factor is that both the father and the mother, under the most solemn and pathetic circumstances, when the mother was looking into her grave, and was anxious as to these little children, committed them to the grandmother upon the agreement and promise that she should keep them, and be entitled to retain them until her death. The mother knew they were tender babes. Her soul was sick in the hour of death about their custody when she should be no more. Her heart yearned with anxiety that her mother should take them and raise them, and she communicated this desire to her husband in her dying moments, and he solemnly agreed to it in the presence of the grandmother, and the grandmother accepted this pious but burdensome trust, and it thus became a contract in the most solemn form and under the most impressive circumstances, if such a contract there can be in law to bind the father. The grandmother swears to this in the most solemn form. Other witnesses confirm it. It is fairly well proved. Indeed, the very fact that these children had been raised by the grandmother to their then age of under four years, and the father had no one to look to for their care, and they must have such care, we are justly warranted in saying that such a contract was in all human probability made. The only question then remaining is, What is the effect upon the father of such a contract? Judge English, in Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308, cited authorities to sustain the binding effect of such a contract upon the father, and this court held it binding in that case. The same principle is held to apply to such a contract between a father and grandparents in Green v. [248] Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212. This settles the case against the plaintiff in this writ of habeas corpus. Unless the welfare of the child demands a disregard of such a contract, it is binding. It is not binding under those decisions if the welfare of the child does demand that the contract be disregarded. But the welfare of these children does not demand, but denies, that these children should be taken from their grandmother. They have never known any other mother. Mrs. Hickman's family is composed of herself, her husband and one son, and they are capable of taking care of them and are very much attached to them. The children must be attached to their grandparents. Would the children be happy if taken from their present home and from the loving care of their grandmother? Would they not be miser-

able? It is proven that they have a good home and are tenderly cared for. When so young should they be torn from their present home. Their grandmother shows in the strongest manner her love for them. She said in her evidence, "I love to keep them and I would rather Sam Fletcher would shoot my heart out than take them. They are all the company I have." If taken from her, to what home would they be taken? The father is a conducter on through freight trains on the Baltimore and Ohio Railroad, and can seldom be at home. If he takes them to his own mother, who never even knew them scarcely, however worthy she may be and doubtless is, they would not be as happy as with Mrs. Hickman. In fact, it does not appear that their paternal grandmother desires their custody, but, on the contrary, we may infer that she does not desire them to be placed in her custody. The plaintiff was asked if he did not go to his mother and ask her to take Loring, and whether she didn't reply, "Sam, I raised my children and you can raise yours." He declined to answer the question. Thus we are not only justified in this decision by the force of the husband's said agreement, but also by considerations for the welfare of the children themselves. Therefore, we reverse the judgment and remand Lora Fletcher and Loring Fletcher to the custody of Sarah E. Hickman, their grandmother, and dismiss the writ of habeas corpus.

CONTRACTS FOR TRANSFER OF PARENTAL CUSTODY AND RESPONSIBILITY.

I. Common-law Rule.
 a. Contract Void.
 b. American Adherence to English Rule.
II. Revocation of Contract.
 a. Written Agreement.
 b. Parol Agreements.
III. Validity and Essentials of Contract.
 a. Enforcement of Contract and Rights Thereunder.
 b. Revocation of Agreement.
IV. Welfare of Child.
V. Right Under Statute.
VI. Illegitimate Child.
VII. Expiration of Agreement.

I. Common-law Rule.

a. Contract Void.—Under the old common-law rule a covenant by a parent releasing the custody of his child to another, and agreeing to abstain from taking and exercising any control over it was

bad, because it was deemed to be against the policy of the law, which held that it was desirable that the parent should exercise superintendence over his child, and hence that he could not by contract deprive himself of this inherent right and duty imposed upon him by nature any more than he could thus attempt to shirk his responsibility for the support, education, and training of his child. The result of declaring such a contract void was formerly to permit the parent to assert his right to the custody of the child, and thus regain control of it at any time he chose. The majority of the cases of later date, however, show a wide departure from the earlier doctrine and not only recognize the validity of such a contract, but enforce it, and refuse to permit him to assert his parental rights when such action is for the best interests of the child. The common-law doctrine is supported by the following: Westmeath's Case, Jac. 251; Swift v. Swift, 34 Beav. 266; affirmed on appeal, 34 L. J. Ch. 394; Van Sittart v. Van Sittart, 4 Kay & J. 62; affirmed, 2 De Gex & J. 249; Walond v. Walond, 28 L. J. Ch. 97; Hamilton v. Hector, L. R. 6 Ch. App. 705.

b. **American Adherence to English Rule.**—Quite a number of the earlier American cases adhered to the common-law rule that a father could not alienate his right to the custody and control of his child, except that he might bind it out as an apprentice; and that an agreement between a husband and wife giving the latter the custody of their child was void as a contract: People v. Mercein, 3 Hill, 399, 38 Am. Dec. 644.

Under this rule the care and custody of a minor child is a personal trust in the father, and an agreement, whether verbal or written, committing it to the care and custody of another until it shall attain the age of twenty-one years is void: State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399. Followed in State v. Clover, 16 N. J. L. 419; Matter of Scarritt, 76 Mo. 565, 43 Am. Rep. 768.

Foulke v. People, 4 Colo. App. 519, 36 Pac. 640, adopts the doctrine that public policy is against the permanent transfer of the custody of a child and the natural rights of the parent, either by parol or written agreement, and that such contracts are not to be enforced specifically unless adopted by legal formalities, as in the case of adoption, and master and apprentice.

In Johnson v. Terry, 34 Conn. 259, it was maintained that a father is entitled at law to the custody and control of his minor children, even to the exclusion of their mother; that he cannot devest himself of their custody by an agreement with her, nor does he lose such right by permitting the children, after being taken away by her, to remain with her for several years undisturbed. It has also been held that although a father's paramount right to the custody of his child may be forfeited by his conduct, an agreement on his part to deprive himself of such right is against public policy and not strictly enforceable: Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389.

Perhaps the latest instance of the enforcement of the common-law rule is in the case of Hibbette v. Bains, 78 Miss. 695, 29 South. 80, where a mother, on her deathbed, in the presence and with the consent of her husband, gave the custody of her children to her mother for life, and, after her death, that of her boy to one aunt, and that of her girl to another aunt, and it was held that such disposition of the custody of the children as a contract, though acted upon for a number of years, was against public policy and void.

In another comparatively late case the rule was adhered to, although the court showed a strong disposition to depart therefrom, and in deciding the question said "that a father cannot by contracts, other than such as are provided for by statute, confer upon another irrevocably and absolutely as against himself, a right to the custody of his minor child. That, notwithstanding any such contract, upon habeas corpus for the custody of such child, the custody will be awarded to the father, unless the welfare of the child demands that it should remain in, or be restored to, the custody of the person with whom it was placed by the father under such contract, or that some other disposition be made of it. Such a contract is not to be entirely ignored. It is to be considered, not for the purpose of fixing the rights of the parties, but for the purpose of shedding light upon their actual relations and feelings toward the infant and assisting the exercise of a wise discretion by the court as to what disposition should be made of it for the promotion of its own welfare. What is for the best interests of the infant is the question upon which all the cases turn at last, whatever may be said in the opinions about contracts, and the answer returned is, that the custody of the child is by law with the father, unless it appears by satisfactory evidence that the best interest of the child demands that he should be deprived of that custody, and upon him who so avers devolves the burden of proof": Weir v. Marley, 99 Mo. 495, 12 S. W. 798. The right of guardianship of a minor child devolving by law upon a parent cannot be assigned or transferred by him, or her: Byrne v. Love, 14 Tex. 81; Cook v. Bybee, 24 Tex. 278.

II. Revocation of Contract.

a. Written Agreement.—In those jurisdictions where a written contract by a father alienating his right to the custody and control of his child to another, and allowing such other to care for and maintain it, is deemed void as against public policy, he has the right at any time to revoke the agreement, although acted upon, and to retake the custody of the child, provided always that he is a proper person to have such custody, and has the means wherewith to support the child in proper condition: People v. Mercein, 3 Hill, 399, 38 Am. Dec. 644. In another case, a husband, on the death of his wife, gave their babe by written contract to the mother's parents, to care for it "until, at least, she passes her first decade in life." He married again when the child was about seven years

old and then demanded its custody, which the grandparents refused to relinquish. It appeared that the child had been well cared for at their expense, but that the father was able to maintain it and was a proper person to have its custody, and the court held that as such agreement was opposed to public policy he was entitled to retake the custody of his child: Matter of Scarritt, 76 Mo. 565, 43 Am. Rep. 768.

In the absence of anything to show that a mother, who by written agreement has committed the custody of her child to a public institution, is not a suitable person to have the custody of such child, she is entitled to regain the custody at any time: Wishard v. Medaris, 34 Ind. 168; Lovell v. House of Good Shepherd, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660.

b. **Parol Agreements.**—Quite a number of cases maintain that a father has no power to make a mere oral gift of his minor child to another, and that an oral agreement, express or implied, made by him that a third person shall have the custody of his child for a certain time, or during infancy, does not preclude the father from revoking the agreement and reclaiming the custody of the child, provided, of course, he is able financially, and is a fit person, to maintain it and have its control: Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Foulke v. People, 4 Colo. App. 519, 36 Pac. 640; Dalton v. State, 6 Blackf. 357; Child v. Dodd, 51 Ind. 484; Brooke v. Logan, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669; Hussey v. Whiting, 145 Ind. 580, 57 Am. St. Rep. 220, 44 N. E. 639; Hunt v. Hunt, 4 G. Greene, 216; Burger v. Frakes, 67 Iowa, 460, 23 N. W. 746, 25 N. W. 735; Hibbette v. Baines, 78 Miss. 695, 29 South. 80; Weir v. Marley, 99 Mo. 484, 12 S. W. 798; De Jarnett v. Harper, 45 Mo. App. 415; State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399; In re Lewis, 88 N. C. 31. In State v. Libbey, 44 N. H. 321, 82 Am. Dec. 223, it was decided that the rights and duties of a father to his infant child cannot be transferred permanently except by deed, and a parol agreement to transfer them may be revoked by the father, upon refunding the sums of money expended under it.

In all such cases, as in all others involving the question of the proper custody of a child, its welfare is the guiding star in determining the controversy, and if, for any cause, the welfare of the child demands that its care and custody be withheld from its parent in accordance with his agreement, the contract will not be revoked nor the custody of the infant disturbed: Sheers v. Stein, 75 Wis. 44, 43 N. W. 728. On the other hand, if it appears that it will be for the best interests of the child that the parent be given its custody, courts will not hesitate to revoke the agreement: Kuhn v. Breen, 101 Iowa, 665, 70 N. E. 722.

III. Validity and Essentials of Contract.

The great weight of American authority establishes the proposition that a parent has the right to part with the custody of his

child: State v. Kilvington, 100 Tenn. 227, 45 S. W. 433; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17; and "we think reason and authority warrant us in stating as the law, that the custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, is not unlawful or against public policy, and is not such illegal restraint as a court must relieve at the will or caprice of the parent": Anderson v. Young, 54 S. C. 388-394, 32 S. E. 448.

In Bonnett v. Bonnett, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91, the court declared that "the weight of authority, we think, sustains the position that a parent can by agreement surrender the custody of his infant child so as to make the custody of him to whom he surrenders it legal. And when a parent has by contract surrendered his present legal right to the custody of his child, in all subsequent controversies arising respecting its custody the matter of primary importance is the interest and welfare of the child. To this the right of the parent must yield." The agreement to care for the child and the fact that it is taken and supported properly and comfortably for a number of years are sufficient considerations to support such a contract: Bentley v. Terry, 59 Ga. 555, 27 Am. Rep. 399; Townsend v. Warren, 99 Ga. 105, 24 S. E. 960. In accord with these views are a large number of cases, among which may be cited: In re Gates, 95 Cal. 461, 30 Pac. 596; People v. Porter, 23 Ill. App. 196; Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321; Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Enders v. Enders, 164 Pa. St. 266, 44 Am. St. Rep. 598, 30 Atl. 129; Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129; Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308.

In Ellis v. Jesup, 11 Bush, 403, it was decided, at a comparatively early day in the history of this country, that if the authority of a parent over his child arises from the duty he is under to maintain, protect, and educate it, it must follow that when he has surrendered his child to a third person to discharge these natural duties for it, and such person has actually performed them, the authority of the parent over the child ceases and passes to the person standing in loco parentis. "A parent may emancipate his minor child or may forfeit his right by improper conduct. Why, then, may he not transfer to another this right of custody, which he may thus abandon or forfeit, especially when the interests of the child are not prejudiced by the assignment, and how can the court pronounce that custody which is held by a fair agreement with the parent, and not injurious to the child, an illegal restraint? We think that no consideration should be allowed whatever which relates to the rights of the father to the services of the child under such circumstances. The main consideration should be as to the

best interests of the child": Coffee v. Black, 82 Va. 567. In considering the question of returning a child to its father, it has been said that "if the subject were anything but a child, it would not be averred to be the correct and legal thing to avoid the agreement because it is against public policy and against the parental right. I do not think these cases call for such a rule. The interests of the child are paramount upon the question": People v. Brown, 35 Hun, 324. A father can by agreement surrender the custody of his infant child to another so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and regain the custody of the child, unless he can show a clear breach of the agreement, or an abuse of the child: Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308.

Although a father may by contract release his right to the custody of his child, the terms of such contract, to be effective, must be shown to be clear, distinct, and definite: Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; State v. Barrett, 45 N. H. 15.

a. **Enforcement of Contract and Rights Thereunder.**—In order that a contract by a parent releasing the custody of his child to another may stand and be enforced, the person obtaining it must show a compliance with his undertaking, a disposition to act in good faith, and to do everything that he ought to do under the circumstances. Otherwise the contract will not be enforced and may be rescinded: Beller v. Jones, 22 Ark. 92. In Legate v. Legate, 87 Tex. 248, 28 S. W. 281, it was held that a contract yielding the custody of a child by its parent was not void, and that the new relation between the child and the person to whom its custody is given is not unlawful, and when the parent seeks to retake control of his child, as matter of law, the child is entitled to the benefit of that home which will best promote its welfare. Which of the two homes offered the child is best is a matter of fact to be determined from the evidence tending to throw light upon the condition of the two homes and the people in them, including their entire connection with, affection for, and present and future ability to care and provide for the child. And in a later case, State v. Deaton (Tex. Civ. App.), 52 S. W. 591, where a mother, unable to properly care for her young child, entered into an agreement with another that if he would support the child during its minority he might have the custody of it, and pursuant to such agreement he took the child and by lapse of time mutual and reciprocal affection was developed between them, it was decided that, on a change in the financial circumstances of the mother enabling her to care for the child in a suitable manner, she could not regain its custody without showing that its welfare and best interests so required.

If a father and mother living apart by agreement transfer the care and custody of their infant children to the grandfather of the latter, in consideration that he will receive, care, and provide for them, the agreement, if acted upon, makes the custody of the grand-

father lawful, and he has legal capacity to maintain an action for damages against one who wrongfully takes, or causes them to be taken, from his custody, without showing actual loss of services: Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

An agreement to pay a mother a designated sum if she will permit her son to live with, and be educated by, her grandfather until he arrives at age is valid, and may be enforced by the mother. Such contract is not void as against public policy, if the interest of the child is intended to be enhanced thereby, and parental solicitude and affection is not extinguished: Enders v. Enders, 164 Pa. St. 266, 44 Am. St. Rep. 598, 30 Atl. 129. This case is somewhat peculiar from the fact that it is the only one coming under our observation where a money consideration was agreed to be paid in consideration of the agreement transfering the custody of the child.

In Curtis v. Curtis, 5 Gray, 535, the court decided that a contract made by a mother after the death of her husband committing the custody of her child to a third person was binding on her, whether it was sufficient according to the law of the state where made or not, to transfer the custody of the child. And again, in Dumain v. Gwynne, 10 Allen, 270, the court stated that it is the present policy of the law to regard any reasonable arrangement of a mother left in such circumstances as not to be able to care for her children, by which they will be cared for, as valid, and she was refused permission to recover possession of children whom she had by written contract placed with a public institution to be kept by it. The court, in delivering the opinion, said that "without holding that the rights of the parent in respect to the children are absolutely lost, we must nevertheless hold that they are subject to the rights of the other party to the contract, it having been freely and favorably made. But the rights of the corporation under it depend upon its fulfillment in good faith on its part": Dumain v. Gwynne, 10 Allen, 274.

If a father has voluntarily suffered the custody of his children to be committed by agreement to third persons, such custody will not be restored to him, unless it is for the benefit of the children to do so: People v. Erbert, 17 Abb. Pr. 396; Merritt v. Swimley, 82 Va. 433, 8 Am. St. Rep. 115. If a mother, who by contract has put the custody of her child in the hands of third persons who take excellent care of it for a long period of years and learn to regard it as their own, remarries, she will not, upon a showing of ability and fitness to care for the child, be permitted to retake its custody: Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129; People v. Brown, 35 Hun, 324.

b. **Revocation of Agreement.**—If a parent by voluntary contract releases his parental power over his child to another, he cannot revoke such contract after it has been acted upon in good faith, except for sufficient legal reasons, such as insufficient support, bad

treatment, or the like: Bently v. Terry, 59 Ga. 555, 27 Am. Rep. 399; Bonnett v. Bonnett, 61 Iowa, 198, 47 Am. Rep. 810, 16 N. W. 91. A parent who agrees that his child may be brought up by another cannot, after the agreement has been acted upon for several years, rescind it and recover possession of the child: Commonwealth v. Gilkeson, 1 Phila. 194. Or if the parent has transferred the custody of his infant child by fair agreement, which has been acted upon by such other person to the manifest interest and welfare of the child, the parent cannot be permitted to reclaim its custody, unless he can show that a change of custody will materially promote the welfare of the child: State v. Deaton (Tex. Civ. App.), 52 S. W. 591; Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308.

After a child has been permitted to grow up in a family of a third person as his son, such person cannot raise the objection that the agreement is not binding, on the ground that he could not have enforced it against the child's parent, for the purpose of avoiding his liability under the contract to provide for the child as his son: Van Dyne v. Vreeland, 11 N. J. Eq. 370, affirmed, 12 N. J. Eq. 142. A contract by which a mother agrees to relinquish the custody of her child to a third person who agrees to adopt the child is, after the mother and child have performed their part of the agreement, enforceable by the child or its heirs against such third person, and cannot be revoked by the latter: Healey v. Simpson, 113 Mo. 340, 20 S. W. 881.

IV. Welfare of Child.

In all cases, whether or not a contract by a parent relinquishing the custody of his child to another is regarded as strictly enforceable and irrevocable, the best interests of the child are questions of primary, paramount, and controlling importance. The sum total of the holdings of all the courts is well voiced in State v. Libbey, 44 N. H. 321, 82 Am. Dec. 223, where it is maintained that the courts will, in all cases, in determining the question of the custody of the child, take into consideration its condition with the persons from whose custody it is sought to be taken, its relation to them, the present and prospective provision for its support and welfare, the length of its residence there, and whether with the consent of its parent, and an agreement, express or implied, that it should be permanent, the strength of the ties that have been formed between them, and if the child has come to years of discretion its wishes upon the subject. In accord with this holding there are many cases, among them being Verser v. Ford, 37 Ark. 28; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Brinster v. Compton, 68 Ala. 299; McKenzie v. Dickinson, 80 Ind. 547; Jones v. Darnall, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229; Drumb v. Keen, 47 Iowa, 435; People v. Porter, 23 Ill. App. 196; In re Beck-

with, 43 Kan. 159, 23 Pac. 164; Sturtevant v. State, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617; People v. Erbert, 17 Abb. Pr. 395; In Matter of Murphy, 12 How. Pr. 513; Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129; Coffee v. Black, 82 Va. 567; Sheers v. Stein, 75 Wis. 44, 43 N. W. 728. Although a father's agreement to surrender the custody of his child is not regarded as irrevocable, the welfare of the child is of primary and paramount importance, and the wishes and feelings of the child should be consulted, though not necessarily allowed to prevail: People v. Porter, 23 Ill. App. 196. The court has a discretion in determining who shall have the custody and control of an infant, and its welfare is the pole star by which the discretion of the court is to be guided. The rights of the child are first to be considered, and are clearly to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and, if not, to have its personal safety and interests guarded and secured by the law, acting through the agency of those who are called upon to administer it: Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115.

V. Right Under Statute.

Under a statute in Maine, the right of a parent to the custody of his child could be transferred by contract: State v. Smith, 6 Me. 462, 20 Am. Dec. 324. A New York statute declares that every father may by deed or last will dispose of the custody and tuition of any living child, or one likely to be born, during its minority, or for any less time, to any person or persons in possession or remainder: Fitzgerald v. Fitzgerald, 24 Hun, 370; In re Murphy, 12 How. Pr. 513. In Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48, the court maintained that it was indisputable that a father has the right to the control of his minor child, and that this can be relinquished or forfeited only in one of the modes recognized by law. However, the Georgia code, section 1793, expressly provides that the control of the child may be lost by voluntary contract releasing the right to a third person, and the court, in deciding the above case, maintained that where it is insisted that the father has relinquished his right to the custody of his child to a third person by contract, the terms thereof must be clear, definite and certain, to have the effect of depriving the father of the custody of his child.

VI. Illegitimate Child.

The mother has the superior legal right to the custody and control of her minor illegitimate child, and may by contract transfer such custody to another, and, in a subsequent controversy as to the custody and control of such minor, the interest of, benefits to, and welfare of the child must be consulted and the custody thereof placed where such general welfare will be best promoted: Marshall v. Reams, 32 Fla. 499, 37 Am. St. Rep. 118, 14 South. 95.

VII. Expiration of Agreement.

If a child has, under contract made by her parents, resided for a certain time with others, who seek to detain her after the expiration of the contract, and with whom she prefers to remain, the wishes of the child should not be disregarded, but the controlling consideration should be the best interests of the child, with due regard to the natural rights of the parents, to whom the child should be returned if its best welfare is promoted thereby: Shaw v. Nachtwey, 43 Iowa, 653. A father cannot by instrument, in writing or otherwise, relinquish or surrender to another the custody of his minor child, so as to deprive the mother of such child of its care and custody after the father's death: State v. Reuff, 29 W. Va. 751, 2 S. E. 801.

MAXWELL v. LEESON.

[50 W. Va. 361, 40 S. E. 420.]

JUDGMENTS—SCIRE FACIAS—PARTIES.—In scire facias to revive and have execution in the name of the personal representative of a dead plaintiff in a money judgment, against the living defendant, it is not necessary to make terre tenants parties, and the issue of execution upon scire facias, keeping alive the lien of the judgment on land as to the defendant, keeps the lien alive as to terre tenants, though they are not parties thereto. (p. 877.)

JUDGMENTS—LIEN OF—SCIRE FACIAS.—A judgment lien on land continues, notwithstanding the death of the defendant, and though execution is suspended thereby, and it may be enforced in equity without revival by scire facias, so long as the scire facias will lie to revive the judgment. (p. 879.)

JUDGMENT.—THE LIEN OF A JUDGMENT UPON LAND arises from the judgment itself, independent of execution upon it, so long as the judgment is not barred by limitation. (pp. 879, 880.)

JUDGMENTS—SCIRE FACIAS—DEFENSES.—In scire facias to revive a judgment, payment, release, or other matter arising after judgment, may be pleaded as a defense, but not any other matter existing prior to the judgment. (p. 880.)

JUDGMENTS.—PRIVIES IN ESTATE ARE NOT BOUND by a judgment against him from whom they derive their estate, rendered after they have derived it, merely because of such privity. (pp. 880, 881.)

JUDGMENT ON SCIRE FACIAS reviving a judgment and awarding execution for money in the name of a personal representative of a deceased plaintiff for a sum less than the original judgment, by reason of partial payments thereon, is not void as creating a new judgment, nor by reason of the variance in amount from the original judgment. (p. 883.)

E. Maxwell and M. F. Snider, for the appellant.

B. F. Ayers and H. Adams, for the appellee.

[362] BRANNON, P. Franklin Maxwell, on July 29, 1885, obtained a decree in the circuit court of Doddridge county against Leroy Leeson for seventeen hundred and fifty-seven dollars and fifty cents, and docketed it in the judgment lien docket, and on August 24, 1885, execution issued, which was returned, by direction of Maxwell, by the sheriff. Then Maxwell died, and in February, 1895, W. Brent Maxwell, administrator of Franklin Maxwell, sued out a writ of scire facias against Leeson to revive the judgment and have execution awarded in his favor as administrator and on the 22d of March, 1895, the circuit court of Doddridge county entered an order in chancery reviving the decree in the name of said administrator and awarding execution. On the third day of February, 1896, an execution was accordingly issued, and [363] was returned unsatisfied. Leeson owned lands bound by the lien of this decree, some of which he conveyed to Amzella Inskeep and some to W. H. H. Douglass, and said administrator, W. Brent Maxwell, brought this suit in equity in the circuit court of Doddridge county against Leeson, Inskeep and Douglass to enforce the lien of said decree against the lands so conveyed by Leeson to Inskeep and Douglass, which suit resulted in a decree dismissing Maxwell's bill on demurrer, and Maxwell has appealed to this court.

A question in the case is whether the decree is barred by the statute of limitations as to Inskeep and Douglass. This chancery suit was brought on the 2d of September, 1899, more than ten years from the return day of the first execution, and thus the judgment is barred unless the decree, or rather, the award of execution upon the scire facias saves it from the bar of the statute. Inskeep and Douglass say that that scire facias and the award of execution upon it can have no effect upon them, because they were not parties to it. They are grantees of Leeson in possession while the lien of the judgment was in force. Is it necessary that Inskeep and Douglass should have been made parties as terre tenants to that writ of scire facias? The authorities differ upon this question. It is laid down in 21 American and English Encyclopedia of Law, first edition, 861, 862, that "where the judgment debtor has parted with the possession of the land during the time the land was liable to execution under the judgment, the present occupant or terre tenant must be made a party to and served with the writ of scire facias. The terre tenant is one who has an estate in the land coupled with the actual possession derived mediately or immediately from the judgment debtor while the land was bound by the lien." 1 Black on Judg-

ments broadly says that "the rule is that on a scire facias to revive the lien of a judgment on land, which is in the possession of a terre tenant, it is essential that the terre tenant be made a party to the proceeding." To support this position we are also referred to Mower v. Kip, 6 Paige, 88, 29 Am. Dec. 748, and Chahoon v. Hollenback, 16 Serg. & R. 425, 16 Am. Dec. 587, and Morton v. Crogan, 20 Johns. 106, and Freeman on Judgments, volume 2, page 767. In this case the scire facias was against a living defendant, and sought execution in behalf of the administrator of a deceased plaintiff. In such case I state the true rule to be that laid down in 1 Freeman on Executions, section 87, that "in the case of the death of the original defendant the terre [364] tenants are to be made parties, and not where the original defendant is living. This view we think is sustained by the books of practice. In none of these works do we find any reference to any case in which the successors in interest of a living defendant need be summoned as terre tenants. On the contrary, it seems always to be assumed that the only instances in which it can be necessary to summon others than the original defendants are where new persons have become interested either through the death, marriage or bankruptcy of the defendant."

Such, surely, has been the practice in the Virginias. We never make alienees of the judgment debtor parties to a scire facias to revive judgments. It is to be understood that in this case we do not say what the law is as to the necessity of making terre tenants parties who claim under a dead judgment debtor. I think that it is in those states where under execution land may be seized and sold that the rule of making terre tenants parties to a scire facias prevails. Where an execution may be levied upon land there is reason to require notice to be served on terre tenants whose land is to be sold from them; but as an execution in this state is not leviable upon land, that reason does not exist. Such purchasers from the judgment debtor can have their land sold only by a chancery suit to enforce the lien of the judgment, and thus have opportunity to make their full defense against it. What is the reason for a scire facias to revive a judgment? It is to make the record consistent. It would not do, where the judgment was between the living parties, to issue an execution in favor of or against their administrators, as this would not harmonize with the record of the judgment; and hence we resort to a scire facias suggesting a change of parties in order to get an execution in new names, and thus show by the record why there is a departure in the execution

from the judgment, and justify such variance. Foster on Scire Facias, 99, says: "It is a general rule that in all cases where a new person who was not a party to a judgment or recognizance derives a benefit by, or becomes chargeable to the execution, there must be a scire facias to make him a party to the judgment. But where the execution is not beneficial or chargeable to a person not a party to the judgment, then it seems this rule does apply, and a scire facias is not necessary. The reason for the rule is that the execution must be warranted by the judgment, and a new party being a stranger to the judgment, he not being named on the record, the judgment [395] would not warrant an execution for or against him until he should be made a party." In the place cited in Foster, and also on page 189, Foster says that "where a sole plaintiff or defendant dies after judgment, a scire facias must be sued out by or against his personal representative, in order that execution may be had of the goods and chattels of the party against whom the judgment is given": See 2 Barton's Law Practice, 1022.

Now, this shows that where the execution goes only against personalty, only the personal representative is a necessary party. It goes to show that only he need be a party to a scire facias whose property is to be taken by execution under it. It goes to show that only a party to be benefited or prejudiced directly by force of the execution itself need be a party to the scire facias. An execution does not either benefit or injure a terre tenant in West Virginia because his land cannot be taken by it and it has no effect upon him directly—the execution itself has not. This is confirmed by Maryland decisions cited for the proposition, that although the defendant be living, the judgment cannot be revived against him so as to affect his grantees, unless they are made parties. But those cases show that it is upon the ground of contribution that all terre tenants are required to be made parties to a scire facias. There the execution operates to sell the land, and in order that one party may have contribution from other vendees to help pay the debt, they must be parties: Doub v. Barnes, 4 Gill, 1; also Morton v. Crogan, 20 Johns. 106. These views tend to the conclusion that as in this state an execution does not affect land, there need not be in any case of scire facias service thereof on terre tenants, and they need not be parties; but this case being against a living defendant the terre tenants need not be made parties to the writ. This has been held in Righter v. Rittenhouse, 3 Rawle, 273, and Jackson v.

Shaffer, 11 Johns. 513, and Young v. Taylor, 2 Binn. 228. I will add that the passage quoted above from 21 American and English Encyclopedia of Law, so much relied on to support the necessity of purchasers being parties to a scire facias, relates to cases where a defendant has died.

In West Virginia the judgment is a lien on the land as against the debtor, and on the land conveyed by him after the judgment in the hands of his vendee purchasing after the docketing of the judgment, or without docketing if he have notice of it. He takes the land encumbered by the judgment. He stands in the shoes of the judgment debtor, having acquired the land with [sic] notice of the judgment creditor's rights, and thus he can be in no better plight than the judgment debtor. In Camden v. Alkire, 24 W. Va. 674, and Pickens v. Love, 44 W. Va. 725, 29 S. E. 1018, it was held that where land is encumbered by a deed of trust a purchaser from the grantor in that deed of trust has no greater rights against the creditor than the grantor himself, and the title and possession of the one are no greater than the other, and that as long as the deed of trust is not barred by time as to the maker of the deed of trust, it is not barred as to the purchaser from the maker of such deed of trust.

Why can we not just as well say that he who purchases land with notice of judgments thereon stands in the shoes of him from whom he derives his right, with no higher right than he has, taking the land subject to that lien as long as it continues good against his grantor?

Had Maxwell lived, he could have sued out execution without joining those terre tenants. Then, why cannot his administrator likewise sue out a scire facias without joining them, its only purpose being to accomplish the same end which Maxwell would have accomplished had he lived.

Another consideration seems to me forceful. If either party to a judgment die, while no execution can go without revival against the personal representative by scire facias, yet the lien on the land still exists as long as a scire facias may be sued out, and that is within the period limiting the judgment: Laidley v. Kline, 23 W. Va. 565. As statute law makes the judgment a direct legal lien on the land until it is barred—I say makes the judgment a lien—an equity suit may be brought to enforce that lien notwithstanding the death of a party, either party, may have suspended right of execution upon the judgment until revival: Burbridge v. Higgins, 6 Gratt. 120. This lien is a legal lien, born alone of the judgment, not of an execution,

a lien independent of any execution, the only efficacy of an execution being to keep it alive. If it is capable of execution, or may be revived by scire facias, the lien may be enforced on land in equity, not because of an execution, but without execution, the lien of the judgment on the land being one thing, the lien of an execution on personalty being another thing—just as distinct from each other as is the personal debt of a note secured by deed of trust on the land and the lien of that deed on the land: 2 Minor's Institutes, 314. Who will deny that a suit in equity might be instituted without any execution, at [367] all if the judgment is not barred? Until the late statute requiring the issue of an execution preliminary to a chancery suit upon a judgment, such chancery suit could have been maintained without any execution: Marling v. Robrecht, 13 W. Va. 440; and now, under code of 1899, chapter 139, section 7, surely such chancery suit may be brought without such execution upon a judgment two years old: Dunfee v. Childs, 45 W. Va. 156, 30 S. E. 102. These considerations supplement the argument that the lien of a judgment is separate from and independent of any execution, and that that lien rests on the judgment alone. Notwithstanding death of parties, such suit may be brought in the name of their personal representatives, even though the judgment be suspended by death. The chancery suit gives the representative parties opportunity to make any defense. This is so as to the original parties, their personal representatives or heirs, and why may not a suit be brought without execution against subsequent purchasers with notice? They merely stand in the shoes of their vendor, and can be sued without execution, and in the chancery suit make their full defense. Why make them parties to the scire facias? They could plead nothing against an award of execution except payment or release, something transpiring since the judgment: 1 Black on Judgments, sec. 494; May v. State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726; note to Frierson v. Harris, 94 Am. Dec. 240. They can make that defense of payment, release or setoff, or other subsequent matter arising since the original judgment in the chancery suit; and whilst the original judgment would be res adjudicata upon them, the award of execution upon a scire facias would not estop them as res adjudicata from making any defense against the chancery suit to enforce the lien which the judgment debtor himself could make, because though those purchasers are privies in estate with the judgment debtor, yet the proceedings on the scire facias do not bar them of such defense, for the reason that a privy in estate

is not bound by a judgment or decree against him from whom he derives his estate, after he derived it, merely because of such privity: Bensimer v. Fell, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078 (pt. 4 of syllabus).

As stated above, the judgment may be in a state of suspension so far as execution is concerned, but alive and enforceable in equity on land without revival, because it is not the execution, but the judgment, that affects the land. If we are told that the scire facias does affect the land because it keeps alive the judgment, I reply that the same argument may be made as to a second 883 execution, which surely could go without notice to terre tenants. And I reply, further, that we never have in the Virginias made heirs parties to writs of scire facias to revive money judgments, though on judgments or decrees for the recovery of land, where a writ of habere facias possessionem must issue, as in ejectment, there should be a revival against the heirs, because that writ operates directly on the land. When the mode of enforcing money judgments against land was by elegit, which was a writ of execution operative of its own force upon the land, a scire facias went against the heir and terre tenant; but even then the scire facias might go against the heir alone: 2 Minor's Institutes, 206; 1 Lomax's Digest, 385. Since the abolition of elegit, and the substitution for it by express statute of a lien by the judgment on land, the enforcement of that judgment by a suit in equity, to which the terre tenant must be a party, and in which he can have full defense, there is in practice no such thing as a revival of a judgment by scire facias against heirs or terre tenants. They are brought into chancery to answer the legal lien of the judgment, not an execution. For a time there were two remedies to enforce a judgment against land, elegit and a suit in equity: Code 1849 and 1860, c. 186, secs. 6, 9; Code 1849 and 1860, c. 187, sec. 2. While those two remedies were existent the creditor could resort to either: Borst v. Nalle, 28 Gratt. 430. In case of death the creditor had to revive if he desired to proceed by elegit; whereas, if he desired to proceed by a chancery suit to enforce the lien of his judgment, he could do so without revival. This shows the execution and the judgment are separate and distinct.

Another defense in this chancery suit is, that the judgment, so called, upon the scire facias is void and no lien. This defense is based on the theory that the order upon the scire facias is an original judgment, and not, as it should be, a mere revival and award of execution, because the law is that a scire facias is a

continuation of the same suit, a process in cases of suspension of execution from dormancy of the judgment by death or other cause, to have an award of execution in the name of a new party, and not to try the matter over again, and if the court go beyond this and render an original judgment, as in an original action, it exceeds its jurisdiction proper upon such a writ, and its judgment is void: Hogg's Pleading and Forms, 2d ed., 508; 2 Barton's Law Practice, 1024; 1 Black on Judgments, 498; Lavell v. McCurdy, 77 Va. 763; Wade v. Handcock, 76 Va. 620.

369 As I stated in Crumlish v. Central Imp. Co., 38 W. Va. 397, 45 Am. St. Rep. 872, 18 S. E. 456, I doubt whether such a judgment would be void, though it might be erroneous. If it awarded execution, the balance would be surplusage. My idea is that spoken in 19 Encyclopedia of Pleading and Practice, 291, that "the proceedings upon such a writ of scire facias are the same as in the original action, but it is not necessary that there should be any other judgment than the usual one in scire facias, namely an award of execution." This conveys the idea that it is not void, and therefore I do not think that consideration would prevent the order made on the scire facias from having the legal effect to keep alive the judgment, even if that order were obnoxious to the criticism that it is an original decree, and not mere revival and award of execution. This order recites that Franklin Maxwell had obtained a decree against Leeson for seventeen hundred and fifty-seven dollars and fifty cents, with interest from the twenty-fourth day of August, 1885, and costs, and that one execution had been issued and been returned unsatisfied, and that Franklin Maxwell had died, and W. Brent Maxwell had been appointed administrator, and then reads: "It is ordered that the said decree be revived in the name of W. Brent Maxwell, administrator of Franklin Maxwell, deceased, against the said Leroy Leeson for nine hundred and ten dollars and fifty cents, the unpaid balance of the decree, with interest thereon from the twenty-first day of March, 1895, and the costs of the original decree and the costs of this revival, except an attorney's fee, and that the plaintiff have leave to sue out execution for the same." Now, this is only an order for revival and execution, not a new decree of recovery, because it shows that it is based on the original decree. There is no decretal language in it found in original decrees, as that Leroy Leeson "do pay." True, the sum for which execution as awarded is different, being less, from the original decree. This does not aggrieve Leeson or the terre tenants; the lessening is for their benefit.

But the legal answer to this objection is that the order shows on its face that the original decree had been reduced by payments, and as the law allows a defendant to a writ of scire facias to plead payment of the judgment, the inevitable result, in case of total payment, would be a dismissal of the scire facias, and in case of partial payment an award of execution for a reduced sum. We must infer that the plaintiff admitted certain partial payments and asked execution only for a balance. That payment can be [370] pleaded to a scire facias is well settled: May v. State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726; Lauer v. Ketner, 162 Pa. St. 265, 42 Am. St. Rep. 833, 29 Atl. 908; 2 Barton's Law Practice, 1036; 1 Black on Judgments, sec. 494. I apprehend that execution would go upon the judgment on the scire facias, and that any objection of variance from the original judgment would be met by the record of the scire facias proceeding; or, what would be more technically regular, let the fieri facias recite the original judgment and also that on the scire facias, and thus account for such variance, and also limit the levy to the reduced amount: Richardson v. McDougal, 19 Wend. 80; note to Frierson v. Harris, 94 Am. Dec. 246; Hall v. Clagett, 63 Md. 58; Wright v. Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009.

The result is that we reverse the decree of the twenty-eighth day of November, 1900, overrule the demurrer to the bill, and remand the cause, with leave to the defendants to answer the bill, and for further proceedings according to the principles governing courts of equity.

Scire Facias to Revive a judgment after the death of a party thereto is considered in the monographic note to Frierson v. Harris, 94 Am. Dec. 226-228. It has been held that the death of the plaintiff suspends the right to issue execution until the judgment is revived by scire facias: Tucker v. Carr, 20 R. I. 477, 78 Am. St. Rep. 893, 40 Atl. 1; and that a sale of land made under a special execution issued after the death, without a revivor of the judgment, is void: Seeley v. Johnson, 61 Kan. 337, 78 Am. St. Rep. 314, 59 Pac. 631. But see Rain v. Young, 61 Kan. 428, 78 Am. St. Rep. 325, 59 Pac. 1068.

Execution on a Dormant Judgment is ordinarily considered irregular merely, and not void: Sherrard v. Johnston, 193 Pa. St. 166, 74 Am. St. Rep. 680, 44 Atl. 252; Dakota Investment Co. v. Sullivan, 9 N. Dak. 303, 81 Am. St. Rep. 584, 83 N. W. 233.

UTHERMOHLEN v. BOGG'S RUN COMPANY.

[50 W. Va. 457, 40 S. E. 410.]

NEGLIGENCE—LIABILITY TO TRESPASSERS, INFANT OR ADULT.—In the absence of wanton or willful negligence the owner of private grounds is under no obligation to keep them in safe condition for the benefit of trespassers, idlers, intruders, bare licensees, or others, whether infants or adults, who come upon them not by invitation, express or implied, but for their own purposes, to gratify their curiosity, or for pleasure. (p. 885.)

NEGLIGENCE—LIABILITY TO INFANT TRESPASSER.—One who, in the operation of his business upon his own land, necessarily uses a cable and pulleys, owes no duty to a trespassing child, and is not liable for injuries to it caused by its being caught between such cable and pulleys. (p. 896.)

WITNESSES—COMPETENCY OF CHILDREN.—In most cases, the decision of the trial court as to the competency of a child to testify is final, and it must be a very flagrant case of error to authorize the appellate court to reverse the judgment. (p. 894.)

Howard & Handlan, for the plaintiff in error.

A. J. Clarke and H. M. Russell, for the defendant in error.

458 BRANNON, P. Bogg's Run Mining and Manufacturing Company was engaged in mining coal from its land, and in its operations used a cable for hauling its coal-cars from its mine to the tipple at the railroad and back to the mine. This cable ran over some pulleys necessary for its operation. Raymond Uthermohlen, a boy between seven and eight years of age, was playing with two other small boys on the premises of the said company, and in some way he was caught by the cable and his leg fastened between the cable and one of those pulleys, and badly injured, and then he brought this action against said company in the circuit court of Ohio county to recover damages for his injuries. The court excluded the plaintiff's evidence as not sufficient to sustain the action and directed a verdict for the defendant. The plaintiff Uthermohlen has brought the case to this court.

I think the principles of law stated in Ritz v. City of Wheeling, 45 W. Va. 262, 31 S. E. 993, decide this case for the defendant, and I do not see that I can now add anything of value to what is there said further than to refer to a few cases decided since the decision of that case. It is a fundamental proposition that on 459 the basis of negligence there can be no recovery of damages, unless the defendant owed a duty to the party injured, no matter what his damage may be. There must

be a breach of duty, at the start. That very late, thorough and valuable work, Thompson's Commentaries on Negligence, volume 1, section 3, says: "An essential ingredient in any conception of negligence is that it involves the violation of a legal duty, which one person owes to another—the duty to take care, for the safety of the person or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Therefore, it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." The unfortunate little boy was a trespasser upon the premises of the defendant, and the company, therefore, did not owe any duty to him, except to not wantonly or willfully hurt him. The work just quoted, in section 945, says: "The owner or occupier of real property is under no obligation to make it safe, or to keep it in any particular condition, for the benefit of trespassers, intruders, mere volunteers, or bare licensees, coming upon it without his invitation, express or implied." And in section 946 we read: "As a general rule, the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, intruders, bare licensees, or others who come upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." Surely, this is the law as to adults; but it is said that children form an exception, and it is sought in this case to make the defendant liable because of the tender age of the plaintiff. But we find the general rule above stated to be applicable to children as well as adults, as stated in 1 Thompson on Negligence, section 1025, thus: "The general rule undoubtedly is, that the owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers or as bare licensees; but that, as in the case of adults, they take the premises as they find them, and if they are killed or injured by reason of the condition in which they find them, this does not give a right to an action for damages." Some
460 courts, in cases of grievous misfortune, have departed from these fundamental principles to allow a recovery in violation of the doctrine that where there is no duty broken, there can be no negligence, and that a land owner in the use for lawful pur-

poses of his property owes no duty of care to a trespasser. I repeat, where there is no duty, there is no negligence, and where there is no negligence, there can be no recovery. When once you detract from a man's ownership and lawful dominion and use of his land by holding that in earning a livelihood he must take care to provide for those who come unsolicited upon it, where will you set the bounds of this invasion of this man's rights? Is he to secure his premises for their benefit? It is admitted on all hands that, as a general rule, he is nôt required to do this; but it is said that there is a notable exception to this general rule in the case of children. Judge Thompson, in section 1024, volume 1, puts it thus: "A well-grounded exception to the foregoing principle is that one who artificially brings or creates upon his own premises any dangerous thing which from its nature has a tendency to attract the childish instinct of children to play with it is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it, or coming in its vicinity. Things of this kind frequently pass under the designation of 'Attractive Nuisances.'" That statement is very broad, as it includes any dangerous thing which in nature has a tendency to attract the childish instincts of children to play with it. It is not confined to machinery. Where do we stop under this head? If machinery, what does it include? In these days of machinery, when it has so largely relieved the hands of man, the rule of dangerous and attractive machinery would be comprehensive. What things would be deemed dangerous under the rule above quoted from Thompson? What machinery would be dangerous? Almost all machinery is, in some conceivable circumstances or contingencies, dangerous. Surely, we cannot deny an owner's use of his property by denying to him machinery and appliances that may, under some circumstances, be dangerous. But the thing doing the injury must also be attractive to children. Where do we stop under this head? When we go to say what machinery is attractive to some child, or even to children, we enter upon a wide, uncertain field. Under this rule the owner of land must infallibly [461] judge in advance what is a machine or appliance both dangerous and attractive, on pain of suffering heavy damages. What a constant menace to ownership of real estate! What an infringement upon dominion over private property! It is, in a sense, and in no small degree, a taking of private property, because it detracts from the freedom of its use.

If we stick to the bedrock principles that a man has the right to use his property as he chooses for lawful purposes, and that he owes no duty to use it in any particular way for the safety of trespassers, we have a certain fixed guide. It is true that the little boy is injured, but the owner whose machine injured him was engaged in lawful business upon his own premises, and it was furthest from his intention to hurt the child, and it is only a case of inevitable accident, which always has befallen, and always will befall, humanity, and for which nobody is answerable. This is the only safe rule. The maxim that a man must so use his own property as not to hurt another extends only to neighbors who do not interfere with or enter upon it; the maxim ceases when the trespasser crosses the line: Gillespie v. McGowan, 100 Pa. St. 150, 45 Am. Rep. 365. The doctrine upon which the plaintiff would sustain his case is that extracted above from Thompson on Negligence, and is founded upon a number of cases known as the "Turntable cases," beginning with Railroad Co. v. Stout, 17 Wall. 657, holding that an owner is liable where he uses upon his premises machinery at once dangerous and attractive to children in places where children are likely to go. In the case of Ritz v. City of Wheeling, 45 W. Va. 262, 31 S. E. 993, I expressed dissent from the principle announced in those cases, and stated that they were inconsistent with right of ownership of real estate and the rule that its owner owed no duty to trespassers, and cited several cases from eminent courts flatly condemning the rule, with some which, while following it, expressed a very apparent doubt of it by limiting it to the peculiar circumstances existing in the case of Railroad Co. v. Stout, 17 Wall. 657. I now add several cases since decided disapproving those principles held in the "Turntable cases." The supreme court of Georgia in Savannah etc. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82, disapproved of the "Turntable cases" in an exhaustive opinion. In that case the question whether a land owner owes a duty to a trespassing child is discussed with ability by Judge Fish, and the position is taken that there is no difference between an adult and a child in this respect, [462] and the opinion quotes with approval an article in 11 Harvard Law Review, pages 349, 434, by Judge Smith, ex-justice of the supreme court of New Hampshire, upon the liability of land owners to children entering without permission. He says: "Are there considerations which do not exist in the case of an adult, and which, when put into the scale, ought to turn the balance in favor of a child? The two promi-

nent arguments are: 1. That the child is innocent; 2. That the child is incapable of protecting itself. What force is to be allowed to these considerations, and do they outweigh the reasons against imposing liability upon the land owner? Of course, the innocence of a plaintiff does not per se establish the fault of a defendant. The land owner cannot be liable unless he owes to the child a duty which he has neglected. Should the law, in view of the innocence of the child, impose on the land owner the duty in controversy? No doubt there are cases where a defendant is rightly held liable to a child when he would not be to an adult under similar circumstances. Where it is admitted that a duty exists to use care to avoid harm to both children and adults (e. g., in the use of the public highway), then, in point of fact, more care may be required toward the child than toward an adult. In view of the child's helplessness and unconsciousness of danger, more care may, as a matter of fact, be required under the unvarying legal rule of 'due care under the circumstances,' just as more care, in fact though not in law, may be required to avoid colliding with an obviously lame or blind adult than with a vigorous man in full possession of all his faculties. But all this is true only where it is admitted that a duty exists. 'In considering the question whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult, though where the duty is imposed, the law may exact more vigilance in its discharge as to the former': Citing Denman, J., in Dobbins v. Missouri etc. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62. So, if it be conceded that the defendant was negligent, and that his negligence constituted part of the plaintiff's damage, then the incapacity of a child may furnish a good answer to the defense of contributory negligence. Conduct of the plaintiff, which would have been negligent in an adult, may not be in a child. But the fact that the child was not capable of contributory negligence does not necessarily establish that the adult defendant was negligent. It [463] does not per se prove that the defendant owed to the plaintiff a duty, or that he failed to perform a duty. 'If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous': Citing Felton v. Aubrew, 74 Fed. 353. 'The fact that injury has resulted, and to a child incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability': Citing Culbertson v. Crescent City R. R. Co., 48

La. Ann. 1380, 20 South. 902; Emerson v. Petler, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311; Catlett v. Railway Co., 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062. Obviously, cases of the two foregoing classes do not furnish arguments in favor of creating a duty toward children in situations where no duty would exist toward adults. Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission? The test is not whether their motives were innocent, or even laudable, or whether their conduct was careful, but whether they entered without the owner's permission. If so, they cannot claim that the owner was under a duty to make things safe for their access, or to give warning of nonapparent danger: Citing Morgan v. City of Hollowell, 57 Me. 375; Gramlich v. Wurst, 86 Pa. St. 74, 27 Am. Rep. 685. The decision turns not upon the presence of fault in the plaintiff, but on the absence of fault in the defendant. The plaintiff's action is defeated, not because his own wrong bars a recovery against the land owner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the land owner owed him the duty in question. His trespass is not always a negligent act, and hence does not invariably bar him on the ground of contributory negligence: Citing 1 Shearman and Redfield on Negligence, 4th ed., secs. 97, 98. Nor does his tort, even when he is a conscious and morally excusable trespasser, prevent his recovering against the land owner for negligently bringing force to bear upon him by a positive act done after his entry, a negligent act of commission. But when an adult, who entered without permission, seeks to recover for harm from the condition of the premises, he fails, though morally blameless. He may be a technical tort feasor, but recovery is not denied him by way of punishment for his own wrong. He fails because the land owner owed him no duty to have the premises in safe condition for his entry. Why should the moral 464 innocence of a childish intruder raise a duty on the part of the land owner which is not created by the moral innocence of an adult intruder? The youthful innocence of a child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing entrance of an intruder, or protecting him from harm after entry, less burdensome than in the case of an adult. The child, it is said, is incapable of protecting itself, and hence it is eloquently con-

tended that the law must impose the duty of protection upon land owners. The apparent assumption is that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the land owners because the law can find no one else to bear the burden. The fact is, that the vast majority of children have protectors appointed alike by nature and law, their parents, who have legal power to control their actions and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the land owner to fence them out. If the child is hurt by the active negligence of the owner in bringing force to bear upon him, it may well be that the negligence of the parent in failing to restrain the child's entrance does not bar the child's recovery for the force brought to bear upon him after his entrance. But it is going far beyond this to say that the child can recover for harm sustained by him through the condition of the premises without the immediate intervention of any human agency. When a child wakes up in the morning in his father's house, the duty of providing a safe playground rests upon his parents. Is this duty shifted from the parents to private land owners because the child chances to escape from the parents' care?"

I refer to Judge Fish's opinion in the cited Georgia case as able and full upon this much debated subject.

I will next refer to the New Jersey case of Delaware etc. R. R. Co. v. Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, holding that a land owner is under no obligations to a mere trespasser to keep his premises in a safe condition, and the fact that the trespasser is an infant of tender years affords no reason for modifying the rule, and charging the land owner with a duty which does not otherwise exist. I also refer to Turess v. New York etc. R. R. Co., 61 N. J. L. 314, 40 Atl. 614, holding that a railroad company maintaining upon its own land a turntable is not liable for injury to a child who comes upon [465] the land and is hurt while playing with the turntable, and that an invitation to the child will not be implied from the fact that the turntable, obviously designed for another purpose, furnishes a place for playing which is attractive to children. Both these New Jersey cases are cases of turntables. In both of them it is very correctly stated that the principle on which the doctrine of liability rests in the "Turntable cases," if sound, must be applicable more widely than to railroad companies and their turntables; that it would require a similar rule to be applied to

all owners and occupiers of land in respect to any structure, machinery or implement maintained by them, which presented a like attractiveness and furnishes a like temptation to children. "He who erects a tower capable of being climbed, and maintains a windmill to pump water; he who leaves his mowing machine or dangerous agricultural implements in his fields; he who maintains a pond in which boys may swim in summer, or on which they may skate in winter, would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating are attractions almost irresistible to children, and any land owner or occupier may well believe that such attractions will lead children into danger. Many other cases of like character may be imagined. In all of them the doctrine of the 'Turntable cases' would charge the land owner with the duty of taking ordinary care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it."

An argument used in support of the "Turntable cases" is that the owner by having such attractive machinery invites the child to come upon his premises. That is carrying his act very far, to say that when the defendant has a cable and pulleys made upon his land solely for the mining of coal, he thereby invites children. If this is so, owners of land, if they ultilize their land, will extend a very wide invitation and risk tremendous danger of liability, and in many, many cases must fail to come up to the required standard, however sincere in their efforts to avert harm to children. They would incur vast additional expenditures in inclosing and guarding their machinery, an expenditure wholly unnecessary except to prepare in advance [466] for the preservation of children. In this case it is demanded that we say that the defendant company was bound to go to an expense in amount, which we do not know, to box its cables and pulleys, a duty which might render the use, repair and adjustment of its cable and pulleys very inconvenient. The two New Jersey cases just cited take the position, as I take it, that the presence of such machinery upon the owner's premises necessary in the transaction of his lawful business is not an invitation or an allurement to children by such owner for which he is responsible. The doctrine of the "Turntable cases" shifts the duty of watchfulness and care from the shoulders of parents,

where the Creator has placed it, to the shoulders of the land owner using his property to make a living, and thus materially detracts from the full ownership of property, sacred under our constitution. It is an infringement upon the right of property. I desire also to call attention to the Tennessee case of Bates v. Railway Co., 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069, where it was held that a railroad company need not so fasten its turntables that boys could not unfasten them, and that the company was not required to fasten them any more securely than merely to keep them in their place. In Dobbins v. Missouri etc. R. R. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, it is held that the law imposes no greater duty on a land owner to an infant than to an adult, but where a duty exists, the law may exact more vigilance in the case of an infant. That case very logically criticises Railroad Co. v. Stout, 17 Wall. 657; by saying that the supreme court of the United States spent its argument in the effort to show that the turntable was left unlocked, and that hence the company was guilty of negligence, seeming to forget that before reaching that question another question arose for decision, namely, whether the company was under any duty to the child. Obviously, this criticism was just, since if there was no duty, what mattered it that the turntable was not locked?

But whether the principle of the "Turntable cases" is right or not, a number of courts have said, while following them, that those cases must be limited to the instances before the court, and that the Stout case must not be extended, but limited to its facts. Those cases will not justify a recovery in this case. There the turntable was idle and unfastened, a circumstance which induced the supreme court to find the presence of negligence against the company; whereas in the case before [467] us the machinery was running in actual use, and there is no element of negligence chargeable to this company, unless you criminate it for having the cable and pulleys upon its premises. The cable and the pulleys were necessary in the company's business and upon its private property. It was not in a public place, as was the turntable in the Stout case. A turntable in town is in a much frequented place, and though private property, the place is used much as a highway, and the company may be held to know that children do and will come upon its premises; but we cannot say the same in this case as to the premises of the defendant. It is suggested that there was a road leading through these premises from the city of Wheeling to a house on

the top of the hill owned by the company; but it was a private way used only for the convenience of the company in reaching that house, and in driving a few cows to pasture fields on the hill. That road can exercise no influence in this case. It was a good distance from the pulley which caught the child. It is proven that the company gave no invitation to children to come upon its premises, and that when they did so, they were driven off. It is proven that the unfortunate little boy, Raymond Uthermohlen, and his companions were on the premises near the mine, not near the pulley, a few minutes before the calamity befell him, and they were driven off by an employé of the company, and started to go off the premises, and soon the screams of the little boy were heard. This little boy, as well as others, were uniformly before this accident warned off the premises and told they would get hurt. Thus we can say that the company did not tolerate their presence on the premises, but did everything to keep them off the premises within its power, and preserve them from harm, unless we require the company to fence in its premises or box up its cable and pulleys. The plaintiff's case must rest, in the absence of negligence, upon the theory, and only upon the theory, that the pulleys and cable were things dangerous and attractive to children, and that merely for that cause the plaintiff is entitled to recover. Can we say that such instrumentalities of business prosecuted by an owner upon his own premises are within the rule of dangerous and attractive machinery, even under the principle of the "Turntable cases"? If so, what machinery would not be likewise? What business would not be subject to this constant, imminent danger?

For the reason that no duty was imposed by the law on the [468] defendant to the plaintiff arising from the operation of the machinery in question, and there can be no negligence imputed by law to the defendant, we think that the court committed no error in directing a verdict for the defendant: Ketterman v. Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683; Ritz v. Wheeling, 45 W. Va. 262, 31 S. E. 993. It may not be amiss for convenient reference to cite those cases commonly called the "Turntable cases" upholding the liability of railroad companies as to turntables negligently maintained: Railroad Co. v. Stout, 17 Wall. 657; Keffe v. Milwaukee R. R. Co., 21 Minn. 207, 18 Am. Rep. 393; Kansas R. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Evansich v. Gulf etc. Ry. Co., 57 Tex. 126, 44 Am. Rep. 586; Koons v. St. Louis R. R. Co., 65 Mo. 592; Williams v. Kansas etc. R. R. Co., 96 Mo. 275, 9 S. W. 573; Birds

v. Gardner, 19 Conn. 507, 50 Am. Dec. 261; Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186.

The plaintiff excepted to the action of the circuit court in excluding as witnesses, because of incompetency by reason of infancy, the plaintiff, aged nine years at the time of trial, Elmer Crosby, aged ten years, and George Mentz, aged nearly fourteen. The examination of these witnesses on their voir dire renders it very doubtful whether they were competent. Some of their answers evince competency. The oldest one said he did not hear what the clerk said in swearing him. He said the clerk asked him what the oath was; otherwise he seemed to have some understanding of an oath. But none of them seemed to have an adequate conception of what an oath meant, its sanctity, solemnity, or moral or religious obligation. Under Judge Dent's opinion in State v. Michael, 37 W. Va. 565, 16 S. E. 803, they seem to be incompetent, as he said that children might have some knowledge that it is wrong to tell a lie, yet this may be so slight as to produce no decided or lasting impression on their minds, and they may be easily led to regard as truth what others tell them. I do not think these witnesses exhibited enough intelligence to make them amenable for perjury. But there is another strong consideration which forbids this court from reversing the judgment on this ground. We cannot judge of the real character or degree of intelligence of these witnesses from their mere paper evidence. The judge of the circuit court had a means of decision in this matter not possessed by us—their presence face to face before him, affording him a superior means to judge, of which we are deprived. In almost every case that is the deciding [469] test. In a great majority of cases the decision of the trial court in the matter of the competency of a child, depending as it does, not on age, but on intelligence, must be final, and "it must be a very flagrant case of error to authorize this court to reverse the judgment": Peterson v. State, 47 Ga. 524. It must be a very strong case to reverse: Wharton on Evidence, sec. 368. It is a matter of discretion with the trial court, and cannot be reviewed on appeal: State v. Edwards, 79 N. C. 648; State v. Manuel, 64 N. C. 601. As just stated, some courts hold that the decision of the trial court is not reviewable: Notes to State v. Michael, 19 L. R. A. 610. But the true rule is where the trial court has excluded or admitted a witness in cases of infancy that there can be no reversal, except in a very palpable, unquestionable case of error, amounting to an abuse of discretion. The cases must be very

rare in which there can be a reversal for such cause. See Day v. Day, 56 N. H. 316; Wade v. State, 50 Ala. 164. But aside from these considerations I am free to say, in addition, that from the nature of this case I cannot conceive how any evidence from these witnesses could have changed the result, and therefore there is no error in this matter aggrieving the plaintiff. Therefore, we affirm the judgment.

Liability of the Owner of Dangerous Premises to trespassers does not exist, even in the case of children, unless they are induced to enter upon the premises by something unusual and attractive placed upon it by the owner, or with his knowledge permitted to remain there: Cooper v. Overton, 102 Tenn. 211, 73 Am. St. Rep. 864, 52 S. W. 183; Arnold v. St. Louis, 152 Mo. 173, 75 Am. St. Rep. 447, 53 S. W. 900; Heinmann v. Kinnare, 190 Ill. 156, 83 Am. St. Rep. 123, 60 N. E. 215; Erickson v. Great Northern Ry. Co., 82 Minn. 60, 83 Am. St. Rep. 410, 84 N. W. 462. It has been held that the owner of dangerous machinery in operation in the usual course of business is under no obligation to protect an infant trespasser from injury therefrom: Buck v. Amory Mfg. Co., 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809. See, on this subject, the monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 419.

The Competency of a Child as a Witness is within the discretion of the trial court, and is to be determined by an examination of the child: Note to McGuff v. State, 16 Am. St. Rep. 31; Commonwealth v. Regan, 175 Mass. 335, 78 Am. St. Rep. 496, 56 N. E. 577.

WEST VIRGINIA TRANSPORTATION COMPANY v. STANDARD OIL COMPANY.

[50 W. Va. 611, 40 S. E. 591.]

CORPORATIONS—LIABILITY FOR TORTS—CONSPIRACY. A corporation is liable for its torts, and may be liable for a combination or conspiracy with other corporations or persons, aimed at and accomplishing the injury of other corporations or persons. (p. 897.)

TORTS—WHEN ACTIONABLE.—A legal right must be invaded in order that an action of tort may be maintained. The mere fact that the complainant may have suffered damage of the kind recognized by law is not sufficient, as there must also be a violation of a duty recognized by law. (pp. 898, 899.)

COMBINATIONS IN BUSINESS.—The mere operation of a lawful business by lawful means as a combination between corporations or individuals to draw to themselves business from other competitors, however hurtful to the latter, is not a conspiracy which is actionable. (p. 899.)

COMBINATIONS IN BUSINESS cannot be made the subject of an action, though damage to competitors resulting therefrom, unless something is done which without the combination would

give a right of action. An agreement between corporations or individuals, for the sole purpose of getting trade into one corporation or person, though it causes damage to others, is not actionable. (p. 903.)

COMBINATIONS IN BUSINESS not in the free competition of trade nor for the sole benefit of the business but to induce the withdrawal of custom from another, solely for the purpose of wantonly injuring him, is actionable as an unlawful conspiracy. (p. 907.)

COMBINATIONS IN BUSINESS, wantonly and maliciously formed to induce a person to violate his contract with a third person, to the injury of the latter, are unlawful and actionable. (p. 908.)

PLEADINGS—BILL OF PARTICULARS.—The cause of action or ground of defense must be stated in the pleadings and not in a bill of particulars; but a bill of particulars may be demanded and allowed in a proper case to amplify the pleading, so as to more minutely specify the ground of defense and prevent surprise at the trial. (p. 906.)

Van Winkler & Ambler, W. N. Miller, and M. G. Ambler, for the plaintiff in error.

V. B. Archer, M. F. Elliott, and A. B. Fleming, for the defendants in error.

[612] BRANNON, J. The West Virginia Transportation Company brought trespass on the case in Wood county against the Standard Oil Company and the Eureka Pipe Line Company, all corporations, and [613] upon demurrer to the declaration judgment was rendered for the defendants. The first count of the declaration charges that the plaintiff was engaged in the business of transporting petroleum oils by means of pipe lines and tank-cars from Volcano and vicinity to Parkersburg, and in storing oil, and had expended three hundred thousand dollars in acquiring land, rights of way, lines of tubing and other things necessary in its business, and had built up a large and lucrative business, and that the defendants, maliciously and wickedly contriving and intending to injure the plaintiff and ruin its business, and render its plant and property worthless and deprive it of all its business, did confederate and conspire together and with the West Virginia Oil Company, another corporation, and with C. H. Shattuck and other persons unknown to the plaintiff, and to prevent all persons producing, refining, selling or transporting oils, and particularly to prevent the plaintiff from transporting oils through its pipe lines and by means of its tank-cars, and from storing oil in its storage tanks, and from executing any lawful trade in connection therewith. And it charged also that the Standard Oil Company of New Jersey organized about 1891 and was the successor of all corporations and firms prior to that date associated together under

a contract known as the Standard Oil Trust; that the Camden Consolidated Oil Company was a member of the said trust and under its control; that in 1892 the business and property of said trust were reorganized under, and are now controlled by, the Standard Oil Company, and controlled by the same men formerly owning and controlling said Standard Oil Trust; that the Eureka Pipe Line Company is owned, controlled and operated by the same men, and doing business in the interest of the Standard Oil Company, and is a transportation branch of that company; that the West Virginia Oil Company was organized about 1885 to purchase and operate what was known as the property of the West Virginia Oil and Land Company, a territory on which the plaintiff had laid pipe lines, and from which it had for several years transported oil for compensation; that the Standard Oil Trust, through individuals interested in it, had become large stockholders in the West Virginia Oil Company, and dictated its management, and by means thereof, and of its monopoly of the production, refining and transportation of oil throughout the world, practically controlled the business of said West Virginia Oil Company, and [614] since the reorganization of the Standard Oil Trust by the organization of the Standard Oil Company had continued to do so, and had induced the construction of the Eureka Pipe Line Company, and thus ruined the business of the plaintiff; that this was the object and accomplishment of the said combination and malicious conspiracy.

It is very clear that a corporation can be guilty of a combination or conspiracy with other corporations or persons aimed at and accomplishing the injury of other corporations or persons. It is a mere legal entity, impersonal, and in itself is incapable of so doing; but it is moved by human beings, is operated by human agents, and is thus an active person, not only for damage done in the breach of contracts, but for torts doing others harm. It will not avail either to say that it has no power within the scope of its authority to do wrong, and can do only the lawful things contemplated by the state in the bestowal of its charter, and that therefore so far as its agents make it do wrong, its acts are outside the field of its legal power, ultra vires and void, not binding the corporation, and thus that no tort binds it. Such was the old common-law rule, but it is completely overruled: 7 Am. & Eng. Ency. of Law, 2d ed., 824. That doctrine may do as to contracts; but it cannot plead this doctrine to screen itself from its wrongs done to others against their will and rights:

National Bank v. Graham, 100 U. S. 699. In that case the court says: "They are also liable for acts of their servants while engaged in the business of their principals, to the same extent that individuals are liable under like circumstances: Merchants' Bank v. State Bank, 10 Wall. 604. An action may be maintained against its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence: Philadelphia etc. R. R. Co. v. Quigley, 21 How. 209; 2 Wait's Actions and Defenses, 337-339; Angell and Ames on Corporations, secs. 186, 385; Cooley on Torts, 119, 120." Manifestly, society must have protection against wrongful acts done by these corporate persons, now so numerous and performing so many varied business functions in our day, which so closely touch man in all his affairs. The case of [615] State v. Baltimore etc. R. R. Co., 15 W. Va. 362, 36 Am. Rep. 803, strongly asserts this liability. So Smith v. Norfolk etc. Ry. Co., 48 W. Va. 69, 35 S. E. 834; Gillingham v. Ohio etc. R. R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243; Gregory v. Ohio Riv. R. R. Co., 37 W. Va. 606, 16 S. E. 819. "Upon like grounds, an action may be maintained against a corporation to recover damages caused by a conspiracy to which the corporation was a party": 5 Thompson on Corporations, sec. 6315; Buffalo Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 826. If a corporation have no soul, it has a mind, and can commit a tort involving a mental element. It can, therefore, have a bad, malicious motive through its representative agents acting in its transactions: 7 Am. & Eng. Ency. of Law, 2d ed., 830.

That a monopoly, a huge corporation, or associate corporations, to establish vast business and derive profits therefrom, to the great detriment, the practical ruin of the plaintiff and others in like business, is charged in the first count; but that is not enough. It must appear that this monopolistic business hurt the plaintiff. But that even will not do; it must harm it by doing unlawful things. Not only must the plaintiff have a right, but that right must be injured by the defendants, and injured, too, by unlawful means, by acts which the defendants had no right to do. You must establish that the defendants owed a

duty to the plaintiff, and broke that duty to make an actionable tort. There can be no tort unless there is a duty from one to another, and that duty broken. You must set this down as a test of tort. "A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law: In the language of the civil law mere damnum is not enough; there must also be injuria; that is, ex damno absque injuria non oritur actio": 1 Jaggard on Torts, 87. We must nicely distinguish between "damnum" and "injuria." We commonly use the words "injury" and "damage" indiscriminately; but in the rule above, these Latin words are distinct. "Damnum" means only harm, hurt, loss, damage; while "injuria" comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is damnum absque injuria. Such is the case under the first count of the declaration. The plaintiff had a perfect right to operate its business. So had the defendants the right to operate theirs. [616] They both had right to compete for business. There is no right better established under the law of business than the right of trade competition: Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598; Hutley v. Simmons (1898), 1 Q. B. Div. 181. These companies were owned by the same men. Their interests were common—one buying, refining, and selling oil; the other transporting it. I mean the defendant companies. Had they not a right to work together to promote the common interest? Even to conspire to draw to themselves from other competitors business, so they did no unlawful act? The count charges an arrangement designed to form a monopoly to control or dominate the business of purchasing, producing, refining and selling oil. Everyone has a right to enlarge his business, even though by means of greater capital, superior facilities and capacity he monopolize business and injure competitors. If the business is lawful, so that it violate no state law, even if it overshadow others, who can prevent it in a free country of constitutional law? The constitutions of the state and Union say that there shall be liberty. This includes the right to carry on legitimate business, as much as the right to be exempt from illegal imprisonment of body: State v. Goodwill, 33 W. Va. 179, 181, 25 Am. St. Rep. 863, and note, 10 S. E.

285; Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. Is there too much liberty in America? If so, blame these constitutions. And corporations fall under the protection of the clause of the constitutions referred to; their legal rights are protected the same as those of natural persons: Charlotte R. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. Rep. 255. If the state allows them to do business (and it is only citizens doing business in the name of corporations), how can it withhold from them the right of doing competitive business? If the legislature, under the great police power, can restrict the right to associate persons and their means and intellects in the transaction of lawful business, so as to protect other less favored competitors, and so far as it can constitutionally do so, it must be left to it to do so; but until it does so, the individual cannot complain. The very minute these aggregations conspire to do acts harmful to the state—that is, the general public—to raise or depress prices of necessary things, or to restrain trade, they fall under the power of the state; but the mere operation by lawful means of lawful business, however hurtful to individuals, is not actionable. It may cause damage, but it is damage without violation of right. The very minute [617] the man or corporation, in the operation of business, does an act which is both unlawful and hurtful to another, violative of his right, the wrongdoer is liable to action; but if his act is lawful, he is not liable. This first count charges malicious conspiracy; but if the act is lawful, that matters not. "When the question at issue is, whether one person has suffered legal wrong at the hands of another, the good or bad motive which influenced the action complained of is generally of no importance whatever. What was said in the opening chapter of this work, that the exercise by one man of his legal right cannot be a legal wrong to another, has been abundantly shown to be justified by the authorities, even if it were not in itself a mere truism. An act which does not amount to a legal injury cannot be actionable because done with a bad intent. Any transaction which would be lawful and proper, if the parties were friends, cannot be made the foundation for an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart. To state the point in a few words, whatever one has a right to do, another cannot have a right to complain of": Cooley on Torts, 830, (688). "If one be moved by malice to the exercise of a legal right, no action arises": 6 Am. & Eng.

Ency. of Law, 872, 875; Raycroft v. Tayntor, 68 Vt. 219, 54 Am. St. Rep. 882, 35 Atl. 53. "A lawful act is not actionable though it proceeds from malicious motives": Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599. This is strongly illustrated in Frazier v. Brown, 12 Ohio St. 294, where a farmer dug a hole cutting off underground water accustomed to percolate and ooze through his land to the land of a neighbor, and it was held he was not liable, though he did the act with malice; the motive was immaterial, as he had right to use his land as he pleased: See many cases cited in Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 370, 1 South. 934; Phelps v. Nowlen, 72 N. Y. 39, 38 Am. Rep. 93; Payne v. Western etc. R. R. Co., 13 Lea, 507, 49 Am. Rep. 666; Chambers v. Baldwin, 91 Ky. 136; 34 Am. St. Rep. 165, 15 S. W. 57.

What wrongful acts does this first count state? The formation of trade combination—call it monopoly—is not actionable alone. How far the grant of exclusive privilege by the state (and this is the only monopoly legally speaking) is valid when its right is contested, is one thing. We are not dealing with that. This monopoly is not that. It is the act of persons and corporations, by union of means and effort, drawing to themselves [618] in the field of competition, the lion's share of trade. This is not monopoly condemned by law. The lion has stretched out his paws and grabbed in prey more than others; but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords the right—it is given him by the Maker for existence. The state made the Standard Oil Company, and gave it this right of being and working. Better for its competitors were it not so. What other acts besides the formation of this engrossing association does the first count charge? That it caused the West Virginia Oil Company to build a pipe line from its property to the Baltimore and Ohio railroad to ship its oil to the refinery of the Standard Oil Company. Stockholders in the one were also in the other. Had they not the right to build this line to further their own interests, to convey product of the one for refinement by another? A man owning a farm, and also interested in a mill; may not the mill owners induce the farmer to build some means of transporting his wheat to that mill, without being liable to suit by a man owning a railroad which had been accustomed to carry wheat from that farm? And suppose there were no common interest in the farm and mill, cannot the mill owners induce this farmer to build a means

of transport from his farm to their mill? Is this soliciting trade, by any unusual means, a legal wrong to competitors? The gravest item under this head is the charge that the Standard company required oil producers (without specifying any but the West Virginia Oil Company), as a condition precedent to purchasing their oil, to ship through said pipe line, and required those producers in the land of the West Virginia Oil Company to do so, as a condition precedent to holding their leases, notwithstanding that the more usual and satisfactory route of transport was the pipe line of the plaintiff; and that later the defendants, through the Eureka Pipe Line Company, to further accomplish their purpose of ruining the plaintiff, built a branch pipe line through territory which had for years patronized the plaintiff's line, in order to prevent and forestall the plaintiff from transacting, acquiring or maintaining any business, and from extending its line to any other territory, and that the defendants and confederates, by their monopoly and control over the oil business, refused to ship, or permit others to ship, oils, or buy oils shipped through the plaintiff's line, and being the only refiners of oil at Parkersburg and [619] elsewhere, refused to buy oil shipped through the pipe line of the plaintiff.

At first blush this conduct might appear wrong; but a second thought again presents the question whether the defendants in this did anything unlawful. The defendant companies were all in common interest. Could they not unite to further their interests? Could not the Standard Oil Company buy from whom it chose? And within the pale of this right could it not impose such conditions as it chose? Cannot the village merchant say to the farmer, "I will not buy your eggs, unless you buy my calico?" Cannot the big mill owner refuse to buy wheat from those who do not ship it over a railroad or steamboat line owned by him? Cannot the mill owner refuse to lease his farm to those who do not sell products to his mill? It may be exacting and oppressive; but can other mill owners sue him for this? Is this right not a part and parcel of his business right? It is the right, even when there is no common ownership, as there is in this case, of one man to buy of whom he chooses, and he can impose arbitrary hard conditions, if the other party chooses to accede to them. So it is the clear right of the other party to sell to whom he chooses, and he having this right, how does the other party do a wrong in purchasing from him? The right of the one carries with it the right of the other. These producers of oil had right to sell to whom they

chose, to ship their oil by what pipe line they chose, and they had the right to submit to the terms of the Standard Oil Company, and in view of this right, the company could buy from whom it chose and on such terms as it chose; for the right of the former would bear no fruitage, would be futile, without the corresponding right of contract in the company. Observe, the question here is not one of enforcing a contract in favor of a monopoly, or of determining whether its conditions are reasonable; not a question of how far the courts would go to enforce a contract between the Standard Oil Company and producers or between the Eureka company and producers, binding the latter to transport oil only over that line. Not a proceeding by the state to forfeit a charter for misuse. The question here is, Has the company by illegal act violated the rights of the plaintiff? Counsel for plaintiff put emphasis on the charge of conspiracy and malice, but there can be no conspiracy to do a legitimate act, an act which the law allows, nor malice therein. To give action there must not only be conspiracy, but 920 conspiracy to do a wrongful act. If the act is lawful, no matter how many unite to do it: Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119. "A conspiracy cannot be made the subject of an action, though damages result, unless something is done which, without the conspiracy, would give right of action. The true test as to whether such action will lie is, whether the act accomplished after the conspiracy is formed is itself actionable": Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111. An agreement to get trade into your own hands, that being the sole purpose, though it harm others, is not actionable: Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598; Hutley v. Simmons (1898), 1 Q. B. Div. 181. The case cited by counsel, Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159, was a combination of coal companies to enhance prices to the public. So People v. Sheldon, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785, People v. Milk Exchange, 145 N. Y. 267, 45 Am. St. Rep. 609, 39 N. E. 1062, involved right of a corporation to fix prices of milk, and it was declared against public policy, so as to forfeit charter. Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, comes nearer the point, though it, too, has in it the element of an agreement harmful to the public, and is not a case where owners of property and business, as here, seek to further their interests by inducing others to trade with them, and not with competitors. There is a pure agreement to com-

pel others not to deal with a party, a boycott, not, as in this instance, to compel persons to deal with the defendants. State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279, was an agreement to control production and prices against the public interests, and was a proceeding by the state to withdraw a charter, not an action by an individual on the theory of private injury. I do not say that an individual damaged by a combination against public policy and law cannot sue. I say he can. In Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, it is held that "any man, unless under contract obligation, or unless his employment charges him with some public duty, has right to refuse to work for or deal with any man, or class of men, as he sees fit; and this right which one man may exercise singly, any number may exercise jointly." The wholesale merchants refuse to deal with consumers in favor of retail dealers. Can we consumers sue them? "He may refuse to deal with any man or class of men. It is no crime for any number of persons, without any unlawful object in view, to associate and agree that they will find work for or deal with certain men, or classes of men, or work under a certain price, or without [621] certain conditions": Carew v. Rutherford, 106 Mass. 1, 14, 8 Am. Rep. 287. The great Chief Justice Shaw said that the legality of the association depends upon its object, and whether it be innocent or otherwise: Commonwealth v. Hunt, 4 Met. 111, 38 Am. Dec. 346. The law allows men to combine to obtain a lawful benefit to themselves: Greenhood's Public Policy, 651. In Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428, while condemning the particular act involved in that case, the court declared the right to compete, though it injured the plaintiff. "This would be legitimate. They could do this without responsibility for injurious consequence to the plaintiff's business; but they could not, without some legal purpose directly serving their own business, maliciously induce others not to trade with the plaintiff." Who can say that the acts attributed to the defendants did not benefit them? Had they done these acts to benefit strangers, from malice, it would be different. Now, these companies were furthering their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise

by the defendants of a right of constitutional liberty, accorded alike to all, simply the right of self-advancement in legitimate business, self-preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard we do not yet know; but we do know that thus far the law of the survival of the fittest has been inexorable. Human intellect, human laws cannot prevent these disasters. The dead and wounded have no right of action from the working of this imperious law. This is a free country; liberty must exist. It is for all. This is a land of equality, so far as the law goes, though some men do in lust of gain get advantage. Who can help it?

Counsel for defendants urge that it does not lie in the mouth of the plaintiff to charge upon them the maintenance of a monopoly, for that the plaintiff itself, by this very suit, seeks to enforce a monopoly in favor of itself and exclude others from open trade. I do not regard this question as material in the 622 case, because the sole question is whether the defendants have committed an actionable tort.

Another feature is to be noted. The court does not specify that the plaintiff had any subsisting contracts with oil producers for the conveyance of oil. The field was open to all. If there had been such contracts and frustrated by a malicious conspiracy, it would be actionable, in my opinion, though the cases differ. If done for one's own benefit, it is actionable, there being a fixed contract. Principles stated and cases cited in a Florida case clearly sustain this. It is a luminous case: Flaccus v. Smith, 199 Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 894; Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934. See Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492; Bowen v. Hall, 6 Q. B. Div. 333; Doremus v. Hennesy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96.

There is one charge in the first count which presents a cause of action, and that is, that defendants wickedly and maliciously, to injure the plaintiff, represented to "various persons," customers of the plaintiff, that the plaintiff's pipe lines and appliances were unsafe and dangerous to transport and store petroleum. The question arises whether this count is not too general, or rather, indefinite in not naming the persons to whom such

representations were made. Clearly, the defendants are entitled to specification here, in order to meet the charge. But is this nomination a necessary part of the declaration? I think not, as it can be done by bill of particulars. Considerable is said of the office performed by bills of particulars in Clark v. Ohio River R. R. Co., 39 W. Va. 732, 20 S. E. 696. In that excellent late work, Encyclopedia of Pleading and Practice, volume 3, page 519, the law is put in a nutshell: "A bill of particulars does not set forth the cause of action or ground of defense; these constitute the function of the original pleading. The chief office of a bill of particulars is to amplify a pleading and more minutely specify the claim or defense set up." Here the charge is false representation of insufficiency of the plaintiff's machinery and appliances, which is the ground of action; the persons to whom the representations were made are only a specification to make definite and specific the charge, and to limit its generality. The declaration is not bad for this cause.

It is said that in addition to the charge of false representation, there should be a distinct, affirmative, allegation that the representations were false and the machinery good. That would conform [623] better to technical pleading; but the word "falsely" will answer this purpose, especially in view of section 29, chapter 125 of the code.

Second Count: It specifies as its pointed gravamen that the defendants and Shattuck conspired to destroy the plant and business of the plaintiff, and did by threats and unfair means oblige persons owning and producing oil to ship it by other means of transportation than those of the plaintiff, which persons had before been the customers of the plaintiff, and that the West Virginia Oil Company and Shattuck notified such customers not to ship any oil over the plaintiff's line, and not to permit plaintiff to do any business in transporting oil, so far as such customers could prevent it. While the first count does, the second count does not, state that the defendants were engaged in the business of buying, refining and transporting oil as competitors with the plaintiff, and thus present a justification for their action but simply charges that they interfered unlawfully and maliciously with the plaintiff's business with malign purpose to destroy it. This, I think, is a legal cause of action. It is argued for the defendants that it is not stated that the plaintiff had contracts with its patrons with which the defendants interfered, and without right induced such patrons to break such contracts, and that as such customers had right to deal with whom they

pleased, the defendants could not commit an actionable wrong in inducing them to withdraw their usual patronage from the plaintiff. But it does seem to me that though those customers had such right, it did not impart to the defendants any right and immunity to step in between them and the plaintiff, and induce those customers to withdraw their patronage, not for the benefit of the defendants in the exercise of the right of free competition, but in malice only to injure and destroy the plaintiff. Cases above cited show this. In Delz v. Winfee, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, it is held that while one has a right to deal with whom he pleases, yet this right is limited to him, and does not give another the right to influence him not to deal. It is an officious act, hurtful to another, not done in legitimate competition, without just excuse, done only to injure a fellow. It is a "boycott": Cook on Trade and Labor Combinations, sec. 9; Crump v. Commonwealth, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; Beach on Monopolies, 311, 322. "In all cases, where a man has a temporal loss or damage by the [624] wrong of another, he may have an action on the case to be repaired in damages, the intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong": Walker v. Cronen, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. "Everyone has a right to enjoy the fruits of his own enterprise, industry, skill and credit. He has no right to be protected against skill and competition, but he has a right to be free from malicious and wanton interference, disturbance and annoyance. If disturbance and annoyance come as a result of competition, or the execution of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it comes from the mere wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands on a different footing," and the wrong is actionable: Walker v. Cronin, 107 Mass. 555; 1 Eddy on Trade Combinations, 3480.

Counsel for defendants, in answer to the second count, take the position that no contract is stated as subsisting between the plaintiff and its patrons, and that the defendants are not charged with inducing the violation of any contract, and that as these patrons of the plaintiff had perfect right to withhold their patronage, and could not be sued for so doing, the defendants did no legal wrong in inducing those patrons to do so.

I do not concur in this view. The authorities above logically repel it. That there is no binding contract between employer and employé, or between trader and his usual customers, makes no difference. Presumably, the customers would have continued their voluntary patronage but for the wrongful intervention and influence of the intervener. I think this contention is met by Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

I understand the law to be as follows: One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another, it is actionable, if loss [625] ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere, even for his own benefit, if there is a contract.

I think the second count states a cause of action but for certain defects. It names no customers of the plaintiff whom the defendants instigated to withdraw their custom. This is the very point of the count. The defendants ought to have specification in this important matter. But this can be done by bill of particulars. The count avers that the defendants used threats to compel customers of the plaintiff to withdraw their custom. What threats? What did they have to fear? What was the means of intimidation? The count does not tell us. As one may, as a neighbor or friend, give advice, it seems to me the declaration should negative this by importing a wrongful act; but as it charges the act is done maliciously, with intent to injure, I was put to a query whether that was enough; whether the allegation of threats was necessary; but the count goes on that theory as an elemental wrong, and it seems it ought to specify the threats, so that we may see whether they were such as to induce a withdrawal of custom. Moreover, it seems to me that the mere statement that defendants notified customers not to ship over plaintiff's line, not to store oil with it, not to permit it to do any business, is very general. Ought not some rela-

tion or means of compulsion be shown to exist between the defendants so giving notice and the persons notified to warrant the idea that the defendants had authority to so notify, some means of enforcing such notice, some means to influence such persons? What do the defendants have to meet under this head? How could they prepare for trial?

We hold the first good, and the second bad, and we reverse and remand.

Unlawful Trade Combinations are considered in the monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 235-273. See, also, State v. Santee, 111 Iowa, 1, 82 Am. St. Rep. 489, 82 N. W. 445; State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91; Ertz v. Produce Exchange Co., 82 Minn. 173, 83 Am. St. Rep. 419, 84 N. W. 743; Gatzow v. Buening, 106 Wis. 1, 80 Am. St. Rep. 17, 81 N. W. 1003. An agreement, the purpose and effect of which is to stifle competition and create a monopoly, is void: Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 85 Am. St. Rep. 125, 28 South. 669; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723. As to boycotts and conspiracies to boycott, consult Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607; Ertz v. Produce Exchange, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. W. 737.

PETERS v. JOHNSON, JACKSON & CO.

[50 W. Va. 644, 41 S. E. 190.]

TRIAL—VERDICT in an action of trespass on the case, reading, "We, the jury, find for the defendants," under a plea of not guilty, is good. (p. 910.)

SALE OF POISONOUS DRUGS—PRIVITY OF CONTRACT. A merchant or druggist who, through mistake, negligence, or incompetency, sells to one person a poisonous substance for medicine, when a harmless medicine is called for, when injury results to a third person and stranger to the sale, from the taking of such poisonous substance without negligence, the seller is liable to such third person, though there is no privity of contract between them. (p. 911.)

NEGLIGENCE—PRIVITY OF CONTRACT.—If the duty is cast upon a person to so act that he does not harm others, independent of a contract, he is liable to third persons, even though executing a contract made with a particular person, if he harms others by negligence. (p. 911.)

DRUGGISTS—CARE REQUIRED OF.—APOTHECARIES, druggists and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines are required to be extraordinarily skillful and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds. (p. 912.)

S. Robinson, for the plaintiff in error.

P. W. Morris, B. Fayers, and H. Adams, for the defendant in error.

[645] BRANNON, J. This is an action of trespass on the case brought in the circuit court of Ritchie county by L. J. Peters against the firm of Johnson, Jackson & Co. The declaration alleges that the defendants sold to the plaintiff through his agent, by mistake, saltpetre for epsom salts, and that the plaintiff having taken the saltpetre, believing it to be epsom salts, became sick and suffered great impairment of health. The jury in the case found for the defendants.

One error relied upon is that the verdict reads, "We, the jury, find for the defendants," whereas it ought to read, "We, the jury, find the defendants not guilty." The argument is that as the plea was "not guilty," the verdict should have responded to the issue. Plainly, there can be nothing in this point. The verdict does meet the issue. How could the jury find for the defendants, if they did not find them not guilty? It in effect says they found the issue for the defendants, thus responding to it.

Many verdicts are in this form, and are always regarded as good, just as good as the other form. Verdicts are to be favorably construed, and if the point in issue is substantially decided by the verdict, it is good, and when the meaning of the jury can [646] be satisfactorily collected from the verdict, upon matters involved in the issue, it ought not to be set aside for irregularity or want of form in its wording: Lewis v. Childers, 13 W. Va. 1; Hogg's Pleading and Forms, 2d ed., 227.

Another objection to the verdict is that the jury was sworn wrong, as the record simply says it was sworn "the truth to speak upon the issue joined," whereas, as there had been an inquiry of damages at rules, the jury ought to have been sworn to well and truly find the amount, if any, which the plaintiff was entitled to recover. How can such a point as this be colorably made when there was in court a plea of not guilty, which annulled the rule order for inquiry of damages?

The declaration avers that the plaintiff sent by an unnamed agent to the store of the defendants for epsom salts, and that they wrongfully and negligently sold to the plaintiff by his agent saltpetre, which, being taken, sickened and inflicted lasting injury upon him. The contest in the trial court seems to have been upon the question whether the sale was in fact made to the plaintiff or to McGary. The plaintiff had been sick or in-

disposed at McGary's house for some three weeks, and wanted salts for medicine, and, as he claims, procured the son of McGary, a boy, to go for him to the store of the defendants for the salts; whereas, the defendants claimed that the plaintiff neither sent the boy, nor bought or paid for them; but that Mrs. McGary being informed that the salts which they usually kept in the house were exhausted, sent the boy herself to the store, and bought them herself. The circuit court seems to have acted, in its instructions, upon the erroneous theory that if the sale was in fact to McGary, not to Peters, Peters could not recover. This theory rests upon the reasoning that there was no sale to Peters, no contract, no relation between the plaintiff and defendants, and therefore there was no duty upon the defendants to the plaintiff, the breach of which could give rise to an action. But the law will not sustain this line of reasoning. Can a druggist, from incompetency or negligence, sell to one person the wrong poisonous article, as medicine, which, being taken by such person lying sick in the purchaser's house, inflicts injury upon such third person without any liability upon that druggist to answer to that third person? The law says he is liable to that third person. We know that drugs and medicines are kept in homes, and may, probably will, be used by [647] other persons than the one buying. Such is the probable, usual case. Is it possible that there is no reparation to this third person for irreparable harm to him from such incompetency or negligence? Considering the frightful dangers lurking in drugs, poisons and medicines, this would be a disastrous rule. Is there no duty upon a seller of medicine as to persons who may use them beyond the immediate purchaser, simply because there is no contract between the seller and the third person? Where the action is only for the breach of a contract, only the parties to it or their privies can maintain it. Strangers cannot sue for its negligent breach: Savings Bank v. Ward, 100 U. S. 195; 1 Shearman and Redfield on Negligence, sec. 116; 2 Jaggard on Torts, sec. 260. But where in a given transaction the law puts upon a person the duty to so act that he does not harm others, independent of a contract, he is liable to third parties, even though executing a contract made with a particular person, if he harms others by negligence. The question is, Has the defendant broken a duty apart from the contract? If he has simply broken his contract, none can sue him but a party to it; but if he violated a duty to others, he is liable to them. The single question in a given case is, Was there a duty on the part

of the defendant to the person suing him? Whence does duty come? The general rule is that damages only come from what is the natural, reasonable, probable consequence of an act. If harm may come reasonably and probably to anyone from another's action, there is duty on him so to act as to avoid such injury. Now, where a druggist sells medicine to one, is it not probable that it may be taken by others than his immediate vendee, and if the wrong article, and dangerous, is it not probable that others will receive injury? If under the facts a common-law duty to third persons exists, a party may be sued by such persons for negligence, incapacity or misfeasance in performing his contract with another. This is particularly so in respect to a dangerous thing sold: 2 Jaggard on Torts, sec. 261; 1 Shearman and Redfield on Negligence, sec. 116; note to Trenton etc. Ins. Co. v. Perrine, 57 Am. Dec. 401. "Apothecaries, druggists and all persons engaged in manufacturing, compounding or vending drugs, poisons or medicines, are required to be extraordinarily skillful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds": Howes v. Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251, and note; Craft v. Parker, 96 Mich. 245, 55 N. W. 812; Walton v. Booth, 34 La. Ann. 913, [648] where one sold sulphate of zinc for epsom salts and was held to a high standard of liability. Such persons are liable for the slightest negligence and for ignorance and incapacity. They handle things dangerous to human life and health, and must be most alert to avoid mistakes, and they are bound to have adequate skill: 2 Shearman and Redfield on Negligence, secs. 689, 690. In Kentucky the rule is that a druggist must know what he sells, and if he departs from the prescription, or ignorantly sell wrong and poisonous or hurtful drugs, he is an absolute guarantor, and cannot plead that he has been extraordinarily careful in general: Fleet v. Hollenkamp, 13 B. Mon. 219, 56 Am. Dec. 563. This excludes the question of negligence or ignorance as irrelevant, and bases the position on the tremendous and imminent danger to the public from the sale of poisons and medicines. It can hardly be said to lay down too rigid a rule, looking to the safety of life; but the authorities generally do admit the question of negligence as material, but they demand the utmost caution and skill above stated. Certainly, this duty is demanded as between the parties to the sale, and upon principles above stated this duty exists between the seller and third persons also. A few cases will show this. The leading

case is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, holding that a manufacturing druggist selling a poisonous drug labeled as harmless is liable to a person who, relying on the erroneous label, and without carelessness, takes the drug as medicine, on the ground of breach of public duty, whether the person injured is the immediate customer or not. The druggist, Winchester, sold wholesale to Aspinall, and he to Foord, and Foord sold by retail to Mrs. Thomas. Winchester was held liable to her. The court said: "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of a false label." The court distinguished between articles of imminently dangerous character and those not of such character, in saying: "The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution, or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened [649] could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of his act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinall, and afterward used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence: Lynch v. Nurdin, 1 Ad. & E., N. S., 29; Illidge v. Goodwin, 5 Car. & P. 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge: Dixon v. Bell, 5 Maule & S. 198. The defendant's contract of sale to Aspinall does not excuse the wrong done to the plaintiff. It was a part of the means by which the wrong was effected. The plaintiff's injury and remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label." That case is recognized as sound law almost without

dissent. It is approved in Savings Bank v. Ward, 100 U. S. 204, where it is held that "such an act of negligence, being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party whether there be any contract between them or not. Where the wrongful act is not imminently dangerous to the lives of others, the negligent party, unless he is a public agent, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of contract." This distinction between things imminently dangerous and things not so is drawn in Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, and Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543. In Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298, it was held that if one sell negligently a poison for a harmless medicine to A, who buys it to administer it to B, and gives a dose to B which kills him, an action lies for B's estate. Gray, J., said: "This finding includes a violation of duty on the part of the defendant and injury resulting to the intestate, for which the defendant was responsible without regard to privity of contract between them. The case is within Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, which has often been [650] approved by this court." The same in Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 561, 15 N. E. 350. Blood Balm Co. v. Cooper, 83 Ga. 457, 20 Am. St. Rep. 324, 10 N. E. 118, approves Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, and holds that one who sells dangerous medicines to a druggist to be resold is liable to third parties as if he himself had sold to them. In Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 337, A bought a defective gun which was warranted, and gave it to B, who was hurt by its explosion; it was held B could sue the seller. The principle was applied to persons contracting to build scaffolds to repair buildings, by holding them liable for defects to workmen using the scaffolds, not employed by such contractor, though there was no privity of contract between them: Coughtry v. Globe etc. Co., 56 N. Y. 124, 15 Am. Rep. 387; Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 315. So where a mechanic made bad repair to a gas-meter, which injured a servant in the house: Parry v. Smith, 4 C. P. Div. 325, cited in note in 42 Am. Rep. 315. The text-books lay it down as law: 1 Thompson on Negligence, sec. 817; Cooley on Torts, 82; Wharton on Negligence, sec. 91; 2 Jaggard on Torts, sec. 261. There are cases sometimes cited in this connection where there is no mistake, but the seller knew the article to be de-

fective or dangerous, and put them on the market, and he was held liable to third parties injured. Where one sold to another a bad ladder, knowing it to be bad, and a third party using it in work was injured, he was allowed to recover against the seller: Schubert v. J. R. Clark Co., 49 Minn. 331, 32 Am. St. Rep. 565, 51 N. W. 1103. The knowledge of the seller seemed to govern in that case. There will be found some cases where a seller to one party knows the article is to be used by another. In such case we can base the right on the theory that the third party is the real purchaser, a party to the contract made for his benefit, so that he can sue: Paducah L. Co. v. Paducah W. Co., 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554. Such is the case of George v. Skivington, L. R. 5 Ex. 1, where a husband bought a hair wash for his wife represented to be good for the purpose, and she was allowed to recover. The case is often cited in this connection; but it seems to me to stand on the ground that the seller sold it knowing that it was to be used by the wife, she being a party to the contract, as it was made for her use. The opinions in the case turn it on this knowledge. The seller's representation was also for her use. The seller also knew the character of the article. A number of cases hold the seller liable to strangers to the contract when he knows of defects, but does not [651] disclose them. They are not opposite in this case. One making bad coal-oil, knowing its defect, was held liable in Elins v. McKean, 79 Pa. St. 493. Same principle in Wellington v. Downer etc. Oil Co., 104 Mass. 64. Our case in hand is the case of one selling by mistake the wrong article, by negligence or incompetency, as is claimed, selling a hurtful drug for medicine, when a harmless medicine was called for, and injury resulting to a stranger to the sale. Many authorities hold that one who sells provisions for consumption that are bad and hurtful is liable: Craft v. Parker, 96 Mich. 245, 55 N. W. 812. Much more in the case of hurtful drugs. Would you limit the liability for selling foul food to only him who made the contract of purchase, and leave others at the table, wife, child, boarder, guest, without remedy against the first author of the harm? If one contracts to prepare a supper for a ball or festival, and furnishes sickening victuals, ought not anyone injured go to him for reparation? Under the facts is he not under duty to everyone present in addition to his duty to his contracting party? It was held that he was in Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. Why not also one selling drugs? We must distinguish

cases, and not carry the principle of allowing strangers to the contract to sue for damages in every case. We cannot say that everyone injured from defect in a railroad car, or carriage or machinery, can sue the maker or seller. This would be saying that any stranger could sue for injury for breach of contract resulting in injury to him. Who would sell under such a rule? The explosion of a defective cylinder of a threshing machine did not give action to a person operating it against the manufacturer, for want of privity of contract. If the manufacturer knew of the defect, he would be liable; but if he did not, it would be otherwise, though guilty of negligence in manufacturing and testing: Heizer v. Kingsland etc. Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630. A contracted with the government to furnish a coach for carriage of mail, and B contracted with the government to furnish horses to draw it, and B hired C to drive, and C was injured from a breakdown of the coach. C was denied recovery from A for defect in the coach: Winterbottom v. Wright, 10 Mees. & W. 109. What is the test or criterion always applicable? Hardly any. Each case involving this nice principle must be largely its own arbiter. We say that, as the authorities cited show, a third party, a stranger to the sale, can [652] only sue when the thing used, or the negligent act, is very dangerous to human life, and injury may reasonably be expected to happen to others therefrom.

Contrary to these principles, the court instructed the jury that if the sale of the saltpetre was in fact made to McGary, the plaintiff could not recover, and therefore instructions of the defendants numbered 1, 4, 5, 6 and 7 are bad. I think defendants' instructions 4 and 12 are bad, because they say that only reasonable or ordinary care was demanded. The greatest care is demanded of one who sells dangerous drugs. So also is high skill, certainly ample skill. If one sells them who is not skilled, but incapable of the business from ignorance or want of experience, he must not sell them. He does so at his peril. He assumes the obligations and risks incident to his chosen business.

Saltpetre and epsom salts not being drugs prohibited from sale, except as allowed in section 9, chapter 150 of the code of 1899, it is not unlawful for a merchant to sell them, and instructions 2 and 3 were not objectionable. There is no objection to defendants' 8 and 9 as to contributory negligence. My understanding is that instruction 7 of plaintiff was given, as it ought to have been. Plaintiff's instructon No. 9, saying that no one but a licensed druggist can sell saltpetre, and that its sale was

prima facie negligence, was properly rejected. Whether so selling would be ground for treating him as engaged in the business of a druggist without license is one question; but it would raise no presumption, on that ground alone, for the inference of negligence. Of course, it will be understood that whether the defendant in fact did sell the pulverized saltpetre, and whether it was of a highly dangerous character, as also the question of negligence and unskillfulness, will be matters for the jury under the evidence and law on another trial. For these reasons we reverse the judgment, set aside the verdict, grant a new trial, and remand the cause to the circuit court.

Druggists and Apothecaries are required to be extraordinarily skillful and to use the highest degree of care known to practical men to prevent injury from the use of drugs, medicines, and poisons. A druggist who sells a poisonous drug as harmless is not protected from liability for his negligence by the label of a reputable wholesale house from which he purchased it in an unbroken package if he has broken such package and handled the drug before he made such sale: Howes v. Rose, 13 Ind. App. 674, 55 Am. St. Rep. 251, and monographic note, 42 N. E. 303.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY v. MOREHOUSE.

[112 Wis. 1, 87 N. W. 849.]

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.—LEGISLATIVE DETERMINATION that a particular use shall be deemed public so as to authorize the taking of private property therefor, is binding on any judicial tribunal, if there is any reasonable ground to support it. (p. 921.)

CONSTITUTIONAL LAW—EMINENT DOMAIN—LEGISLATIVE DECLARATION.—A statute authorizing railroad companies to condemn land for branches and spur tracks to any "mill, elevator, store, house, or other industry or enterprise" is valid and constitutional, and the taking of land for a spur track, to be constructed to connect with a single industry, is a taking for a public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination. (p. 923.)

Timlin, Glicksman & Conway, for the appellants.

E. M. Hyzer, for the respondent.

[5] MARSHALL, J. Section 1831a of the Statutes of 1898 provides that "every railway company existing in whole or in part under any law of this state and operating a railway therein may build, maintain, and operate branches and spur tracks from its road, or any branch thereof, to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise ; and may acquire, by purchase or condemnation, in the manner provided in this chapter

for the acquisition of real estate for railway [6] purposes, other than for its main track, all necessary roadways and rights of way for such branches, spur tracks," etc. Respondent, claiming the benefit of such statute, instituted the proceeding here involved. There is no question but that it was and is entitled to such benefit if the establishment and operation of a spur track to an ice industry, for the transportation of ice from such industry to consumers thereof, are within the statute, and that is a public use within the meaning of the constitutional limitation upon the power of the state to take private property therefor. There is no controversy but that respondent satisfies all the requirements of a grantee of the right to exercise the power of eminent domain under the statute, and that the gathering, storing, and shipping of ice satisfies the calls of the statute for an industry to be reached by a spur track, and that the law contemplates only branch tracks leading off from main railway tracks, such branch tracks to be constructed and operated as a part of an entire railway system for the transportation of freight to and from particular points reached thereby.

Appellants' counsel contend, in effect, that if the statute, by its terms, authorizes the taking of private property for right of way for a spur track to a particular industry, for the sole use of the proprietors thereof and of the railway corporation, it is unconstitutional, and that such was the end sought by respondent. On the case made by the findings of fact upon which the decision appealed from rests, we do not need to discuss that proposition. We apprehend that if the facts underlying it were understood to be as stated in the hypothesis, circumstances would not have arisen rendering this appeal necessary or possible. In any event, if the judgment under such circumstances were against appellants, they would have, in support of a reversal, abundance of authority. The trial court concluded from the evidence that the end respondent had in view in seeking to [7] acquire the real estate in controversy was to construct a spur track to the seat of an important ice industry for the purpose of facilitating the transportation of ice therefrom, and from any other such industry that might be established within reach of the proposed track, to various points in various states; that in the operation of the existing ice industry great quantities of ice would be handled from the source of supply to consumers reached by petitioner's railway system; that railway facilities, such as

the proposed spur track was designed to furnish, were necessary to the successful operation of such industry, and to the convenience of the petitioner in the public business of furnishing shipping facilities for the handling of ice; and that the petitioner invoked the statutory power given to railroads to acquire rights of way for spur tracks in good faith, intending to devote the property, when acquired, to the public use declared by the statute. In this we state the effect of the findings of fact upon which the conclusion of the circuit court rests. We are unable to come to the conclusion that the evidence upon which they were found clearly preponderates against them. True, the evidence shows that the proprietors of a single ice industry, by promising to furnish a large amount of ice for transportation over the petitioner's road, and to bear a large part of the expense of establishing the spur track, influenced respondent to undertake such establishment; but it also shows, or tends to show, that respondent intended to make the track a part of its railway system, to control it exclusively, and operate it the same as it operates any other part of such system, acknowledging the right of all persons to be served by the facility for handling ice thus afforded, without discrimination.

In the case upon which counsel for appellants seem to rely, in the main, to demonstrate that the order appealed from is wrong (Pittsburg etc. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453), the decision was based on a far different situation, in the [8] judgment of the court, than that with which we have now to deal. The court there said: "Through the disguises thrown around the case of the petitioner the only purpose discoverable, other than the private gain of the petitioner, is the private gain of the owners of the particular industry whose place of business the petitioner intended to reach by the spur track."

We are not entirely satisfied that such conclusion was justified by the record, as disclosed by the opinion, or the cases cited in support of it, but we will not take time or space here to go into that question. The case is of little or no weight in solving the proposition now presented, it appearing here that the purpose of respondent was to construct and operate a spur track reaching from a main railway track to a large industry, such spur track to form an integral part of its railway system and to be operated so as to facilitate the transportation

of ice for all persons desiring such service, without discrimination.

A still broader claim is made by appellants' counsel than the one above discussed—one that may be said to face as verities the conclusions of fact upon which the trial court rested its decision—namely, that the taking of land for right of way for a spur track reaching to a particular industry, regardless of the nature of the business and the number of persons indirectly interested in its maintenance, is not a taking for public use within the meaning of the constitution, and that the legislative authorization of such a taking is void. In support of that, the question of what constitutes public use justifying the exercise of sovereign authority to lay hold of private property to promote it, is discussed by counsel for appellants at considerable length. As has often been said, the constitution itself furnishes no guide for determining what is and what is not a public use. The dividing line between the two has not been easy to discover. That is evident from the fact that courts have been slow to [9] define it with sufficient distinctness to prevent a conflict of authority. However, some general principles have been established by a long line of decisions, which, in principle and weight, do not reasonably permit of being questioned by reference to the expressions of courts here and there not in perfect harmony therewith; which principles enable courts, where they are recognized, to measure, with reasonable accuracy, most of the situations where it is sought to take private property by the exercise of the sovereign authority, for an alleged public use, and to determine whether, in the real purpose to be effected, such property will have the impress of public use and will be actually devoted thereto. A principle of the first importance is this: Where the constitution, as in this state, does not reserve to the courts, as an original question, the determination of whether a particular use shall be deemed public, the primary inquiry in that regard is for the legislature; and its judgment, when expressed, is deemed to be beyond question by any judicial tribunal if there is any reasonable ground to support it. That is to say, as applied to the case in hand, the legislature having, in effect, declared that the taking of private property for a spur track reaching a particular industry is a taking of private property for public use within the meaning of the constitution, unless it appears that such declaration is so manifestly wrong as not to admit of a reasonable doubt on the question, it must be adopted by

the courts. The real question involved is whether the legislative declaration is constitutional or not, and the rule as to such situations must control: Bankhead v. Brown, 25 Iowa, 540; Hazen v. Essex Co., 12 Cush. 477. In the last case cited Chief Justice Shaw, speaking for the court, said: "If a public use is declared [by the legislature], it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use."

[10] What constitutes public use in the abstract was judicially determined by this court, at quite an early day, in harmony with the decisions of other courts theretofore rendered and the decisions of most courts that followed. In Whiting v. Sheboygan R. R. Co., 25 Wis. 167, 3 Am. Rep. 30, it was said that the public use which justified the application of the doctrine of eminent domain, in the case of railroads owned and operated by private individuals, consists solely in the fact that the owners cannot, without reasonable excuse, refuse to receive and transport passengers and freight when offered, at reasonable rates, and that the state retains the power to regulate and control the franchise and limit the amount of toll which it shall be allowable for the owners to charge. That declaration manifestly presupposes that the business of carrying freight and passengers is one which the legislature may properly recognize as of public concern, and that the public agency, seeking to take private property ostensibly for public use, actually intends to devote it to such use. That has stood as the law of this state for upward of a quarter of a century. It is too late to question it now, even if, as an original proposition, it would be open to criticism, which does not seem to be the case.

It does not appear clearly that counsel for appellants challenged the general doctrine above stated, but rely upon the claim that the legislature went too far in recognizing the convenience of spur tracks to railroads and their patrons in transporting freight to and from a particular industry as a matter of public concern; and that the court below was not justified by the evidence in finding the question of good faith in respondent's favor. As before indicated, we can see no warrant for disturbing the decision complained of on the last subject mentioned. That is purely matter of fact, and we cannot say that the evidence clearly preponderates against the decision. Whether the legislature was warranted in declaring the particular use in question to be public is the [11] most serious question involved. Keeping in mind the fact that the inquiry

as to that only extends to discovering whether there was reasonable ground for the legislative recognition of the facility of a spur track as a convenience or necessity for the transportation of freight to and from a single industry, as a matter of public concern falling within the term "public use," there is no great difficulty in arriving at a conclusion.

It seems that the weight of judicial authority, and the better reasoning, are in favor of the legislation in question. A brief reference to some of the leading authorities will amply show that the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination. In De Camp v. Hibernia etc. Co., 47 N. J. L. 43, a leading case, the court said: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into or to obtain ores from the several mining tracks adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public."

However, the court said that where the franchise is in its nature public, like the transportation of freight, and the industry permitted is one that concerns the public, and all who desire to be served by the enterprise can demand service on equal terms, the number who can take advantage of the convenience is not material. In Contra Costa etc. R. R. Co. v. Moss, 23 Cal. 323, it was held that what constitutes a public use is a matter resting in the sound discretion of [12] the legislature, and that its will must prevail unless it is guilty of a manifest abuse of power; that the imposition on a railroad company by law of the duty to act as a common carrier, where the primary purpose of the company in building its road is to develop an industry in which the public is interested, renders the use of the property of the railroad public and justifies the legislature in granting it the right to resort to sovereign authority so far as necessary to acquire from private parties the property necessary to its enterprise. Chicago etc. R. R. Co.

v. Porter, 43 Minn. 527, 46 N. W. 75, involved every question discussed in this case. The petitioner sought to acquire private property for the purpose of establishing and operating a spur track to a single lumber industry. The evidence showed that the track was to be a part of the petitioner's railway system, was to be used to transport freight to and from the industry at the terminus thereof, and that the principal, if not the only, freight expected was that to be furnished by the proprietors of such industry directly or indirectly; but that the road was to be open to all persons who might desire such service over it. The right of the petitioner to acquire the land for its right of way was sustained, the court saying: "The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small. There is nothing to show that the proprietors of the particular industry are to have any control over or management of the track in question, or to have any right in it other than that of any person or corporation having business establishments along or near it, to wit, the right to ship and receive freight upon it carried or to be carried over plaintiff's lines."

The cases which hold to that doctrine are too numerous to warrant making any attempt to cite all of them. The [12] following are but a small part thereof: Dietrich v. Murdock, 42 Mo. 279; Brown v. Corey, 43 Pa. St. 495; Boyd v. Negley, 40 Pa. St. 377; Waddell's Appeal, 84 Pa. St. 90; North Central etc. Co. v. George's Creek Coal etc. Co., 37 Md. 537; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Lower v. Chicago etc. R. R. Co., 59 Iowa, 563, 13 N. W. 718; National Docks Ry. Co. v. Central R. R. Co, 32 N. J. Eq. 755; Ex parte Bacot, 36 S. C. 125, 15 S. E. 204; Railway Co. v. Petty, 57 Ark. 359, 21 S. W. 884; Bridal Veil etc. Co. v. Johnson, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790; Butte etc. Ry. Co. v. Montana etc. Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232. See, also, Lewis on Eminent Domain, sec. 171; Mills on Eminent Domain, sec. 14; Randolph on Eminent Domain, sec. 54.

Those authorities would have supported a different conclusion in Pittsburg etc. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, than that reached by the court. That

case really seems out of harmony with the current of authority, unless it is viewed in the light of the conclusion reached by the court that the attempt to take private property, though ostensibly for public use, was really for the exclusive use of the proprietors of a particular industry; that is to say, that it was not the purpose of the railway company, in taking the property, to give to all persons desiring to be served by it equal privileges. The court may be said to have determined the question of good faith against the petitioner, and on that based its decision. Here, as before indicated, that question was found in favor of the petitioner, and no good ground is discovered for disturbing that conclusion.

From the foregoing it will be seen that whether a particular use of property may reasonably be declared public has been solved uniformly according to circumstances. That the agency seeking to take the property by legislative authority is essentially a quasi public agency, as a railway corporation, has a very important bearing on the question, and likewise has the importance of the particular industry to be promoted; and the two together have generally been deemed controlling. Where the mining of coal is an important [14] industry, it is held that the legislature may legitimately say that the taking of property for a railroad, indispensable, or reasonably necessary, to the successful operation of a particular coal mine, is a taking of property for public use. Where lumber industries are important factors in the employment and enrichment of the people, the taking of private property for a railroad for the convenience, in the main, of the proprietors and patrons of an industry of that kind, is deemed a taking of private property for public use. Where the fertilization of arid lands is deemed material to the development of the country, it is held to be within legislative discretion to declare the taking of private property for irrigating canals a taking of such property for public use. In the early settlement of the country the importance to the general welfare of establishing and maintaining gristmills was such that it was held that the use of the land covered by back water from the milldams was a public use thereof within the meaning of the constitution. The instances are very few where a grant of power to a recognized public agency, such as a railroad corporation, to exercise the power of eminent domain to acquire private property for its right of way, either for its main track or for its sidetracks or spur tracks to be operated as a part of its railway system, the right to declare what shall

be deemed a public use being vested primarily in the legislature, has been condemned by the courts. We cannot discover any good reason for condemning the legislative action in question in this case, and therefore must affirm the order appealed from.

By the Court. The order appealed from is affirmed.

WHEN THE QUESTION OF THE EXISTENCE OF A PUBLIC USE MAY BE CONSIDERED BY THE COURTS.*

I. In General.

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 - 1. General Rule.
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- f. Inquiry into Ulterior Motives and Purposes.
 - 1. Of Legislature.
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 - 3. Of Private Corporation.
- g. Questions of Expediency, Propriety, etc., for Legislature.
- h. Necessity of Taking Particular Piece or Certain Amount of Land.

*REFERENCES TO MONOGRAPHIC NOTES.

Eminent domain—The necessity of the taking: 42 Am. St. Rep. 406–408.
What uses justify exercise of power of eminent domain: 22 Am. Dec. 686–707.
Right to condemn lands for private way or road: 91 Am. Dec. 585–589.

1. Doctrine that Legislature is Sole Judge of.
 A. In General.
 B. As to Quality of Estate.
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III. Where Legislature has Delegated Power to Exercise Eminent Domain for Public Uses.
 a. As to Nature of Use.
 b. Necessity of Taking Particular Piece or Certain Amount of Land.
 1. In General.
 2. Constitutional Provisions.
 3. Under Power to Take Necessary Land.
 A. In General.
 B. Massachusetts Doctrine.
 C. Discretion Allowed Donee of Power.
 D. General Rule.

I. In General.

The right of the courts to question the existence of a public use such that it will justify the employment of the power of eminent domain is ordinarily exercised in one of two possible cases. The first is that in which the legislature has authorized the employment of eminent domain for a purpose, the public nature of which is questionable, which question it thereupon becomes the duty of the court to determine. The second is that in which, under a statute providing for the exercise of the power for a purpose admittedly public, or for "public uses" generally, it becomes the duty of the court to determine whether the party seeking to avail himself of the statute has brought himself within the sphere of its operation, by showing a public use. In the former, the validity of the legislative act itself is assailed on the ground that it authorizes the employment of eminent domain for a use not public but private in its nature. In the latter, the validity of the legislative action is admitted or assumed, and the question of the existence of a public use arises only in the application of the statute to the particular facts before the court.

Of these, the former is the more frequent and the more important, involving, as it does, a conflict between two co-ordinate branches of the government. It will, therefore, be the first to be considered.

II. In Determining Validity of Legislative Exercise of Eminent Domain.

a. Necessity for Existence of a Public Use.

1. **Must Arise from Particular Provision in Constitution.**—The authority of the judiciary to consider the extent of the legislative

power in the enactment of any law, though formerly denied, is now universally admitted. It rests, however, in any case, upon a conflict, real or supposed, between the legislative act in question and some particular provision of the fundamental law. A court cannot question the validity of legislation on the ground of a conflict between that legislation and the "spirit" of the constitution. As was said by Wallace, J., in a similar connection, in Stockton etc. R. R. Co. v. City of Stockton, 41 Cal. 147: "When we are called upon to declare that there was no authority for the legislature to enact a particular statute, it is necessary that we be pointed to the clause or clauses supposed to have taken away the power entirely, or limited it to something else than the subject to which the legislature has applied it. It will not do to talk about the 'spirit of the constitution' as imposing a limitation upon the legislative power. The limitation ought to be something definite—as definite as a sum to be subtracted from a larger one, in order to ascertain a balance."

2. **Where Constitution Prohibits Taking for a Public Use without Due Compensation.**—It becomes important, therefore, to determine by what provision of the state or federal constitutions the exercise of the right of eminent domain by the legislatures of the several states or by Congress is limited to the furtherance of public uses and prohibited in furtherance of private uses. In the constitutions of a few of the states it is expressly provided that private property shall not be taken for any but public uses. In the great majority of the state constitutions, however, no such clause is to be found. In most, the provision relative to the exercise of eminent domain is the same as, or similar to, that in article 5 of the amendments to the constitution of the United States: "Nor shall private property be taken for public use without just compensation."

In terms, this provision does not limit the exercise of eminent domain to uses which are public, but merely provides that when private property is taken for a public use due compensation shall be made. This view of the effect of the provision was taken in Harvey v. Thomas, 10 Watts, 63, 36 Am. Dec. 141, in which Gibson, C. J., says: "If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private use, even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation made, is a disabling, and not an enabling, one, and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient law-giver to annex no penalty to parricide, or whether it was thought that there would be no temptation

to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the constitution to prevent it." Under this view, it is obvious that the right of the courts to question the existence of a public use would be exercised only in infrequent cases, and, so far as concerns the validity of legislation, would be important only when the constitution expressly prohibited the taking of private property for a private use.

This view is, however, opposed to the great preponderance of authority, and the rule is well settled that the legislature cannot take private property for a private use. By some of the courts this is put upon the ground that the constitutional provision that private property shall not be taken for public use without just compensation, is equivalent to a constitutional declaration that private property, without the consent of the owner, shall only be taken for a public use, and that the constitution, by authorizing the appropriation to public use, impliedly prohibits the taking of property from one person and applying it to the private use of another: See Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274, and cases there cited. The more frequent, and it would seem, the sounder reason is that the transfer of private property from one individual to another is not a legislative act. As is said in Coster v. Tide Water Co., 18 N. J. Eq. 54: "The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation; it is simply robbery."

Whatever the true basis of the rule, however, the rule itself is well settled, and it is now the doctrine of all the states that legislative power does not authorize the taking of private property for any but a public use: Sadler v. Langham, 34 Ala. 311; Roberts v. Williams, 15 Ark. 43; St. Louis etc. Ry. Co. v. Petty, 57 Ark. 359, 21 S. W. 884; Consolidated Channel Co. v. Central Pac. Ry. Co., 51 Cal. 269; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561; Central Ry. etc. Co. v. Atlantic etc. R. R. Co., 50 Ga. 444; Chicago etc. R. R. Co. v. Lake, 71 Ill. 333; Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135; Bankhead v. Brown, 25 Iowa, 540; Pearce v. Patton, 7 B. Mon. 162, 45 Am. Dec. 61; Schuffletown Fence Co. v. McAllister, 75 Ky. (12 Bush) 312; Robinson v. Swope, 75 Ky. (12 Bush) 21; Shake v. Frazier, 94 Ky. 143, 21 S. W. 583; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; New Central Coal Co. v. Georges Creek Coal etc. Co., 37 Md. 537; Van Witson v. Gutman, 79 Md. 405, 29 Atl. 608; City of Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Woodward v. Central Vt. Ry. Co. (Mass.), 62 N. E. 1051; Board of Health of Portage Tp. v. Van Hoesen, 87 Mich. 533, 49 N. W. 894; Miller v. Frost, 14 Minn. 365; Dickey v. Tennison,

27 Mo. 373; Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547; Welton v. Dickson, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559; Paxton etc. Land Co. v. Farmers' etc. Land Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343; Dayton Gold etc. Min. Co. v. Seawall, 11 Nev. 394; Concord R. R. Co. v. Greely, 17 N. H. 47; Underwood v. Bailey, 59 N. H. 480; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Coster v. Tide Water Co., 18 N. J. Eq. 54; Ten Eyck v. Delaware etc. Canal Co., 3 Harr. (N. J.) 200, 37 Am. Dec. 233; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Pocantico W. W. Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; In re Albany St., 11 Wend. 149, 25 Am. Dec. 618; Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 787; Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468; Shaver v. Starrett, 4 Ohio St. 494; McQuillen v. Hatton, 42 Ohio St. 202; Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287; Dalles Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78; Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722; Appeal of Palairet, 67 Pa. St. 479, 5 Am. Rep. 450; In re Rhode Island etc. Ry. Co., 22 R. I. 457, 48 Atl. 591; Harding v. Goodlet, 11 Tenn. (3 Yerg.) 40, 24 Am. Dec. 546; Memphis Freight Co. v. City of Memphis, 44 Tenn. (4 Cold.) 419; Nalle v. City of Austin (Tex. Civ. App.), 21 S. W. 375; Salt Co. v. Brown, 7 W. Va. 191; Varner v. Martin, 21 W. Va. 534; Newcomb v. Smith, 2 Pinn. 131; In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288; Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416.

3. **Under Fourteenth Amendment.**—Moreover, independently of any restriction expressed in, or to be implied from, the provisions of the state constitutions, it is held by the supreme court of the United States, and would seem to be the accepted rule, that a "taking by a state of private property, ... without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth article of amendment of the constitution of the United States": Missouri Pac. Ry. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130. To the same effect, see Matter of Tuthill, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303. Compare 55 N. Y. Supp. 657, 36 App. Div. 492.

b. Under Constitutional Provisions.

1. **Committing Determination of Existence of a Public Use to the Courts.**—In Colorado and Missouri, the question is definitely settled by the state constitutions by the following provision: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." In Denver R. R. etc. Co. v. Union Pac. Ry. Co., 34 Fed. 386, it is held, with reference to this provision in the constitution of Colorado, that

it is merely declaratory of the law as it stood before the constitution was made, and that the question whether a particular railroad was a public use was open to question by the courts, even in the face of a constitutional declaration that all railroads should be public highways, and all railroad companies common carriers. In City of Savannah v. Hancock, 91 Mo. 54, 3 S. W. 215, however, with reference to the same clause of the Missouri constitution, the provision is said to change the law previously in force, by repealing the rule that the judgment of the legislature as to the public nature of a particular use will be respected by the courts unless clearly wrong. "They are freed from the influence of any expressed judgment of the legislature in that behalf, and enjoined to determine the question wholly regardless of what that branch of the state government asserted upon the subject." See, also, in this connection, Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406; Aldridge v. Spears, 101 Mo. 400, 14 S. W. 118; Kansas etc. Ry. v. Northwestern Coal etc. Co., 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684.

2. **Authorizing the Exercise of Eminent Domain in Behalf of Private Uses.**—In a number of the states, provision is made by the constitutions for the exercise of the right of eminent domain in behalf of certain uses, in some cases admittedly private in their nature. Where such provisions exist, with reference to the particular uses covered by them, the courts have no right to question the validity of legislative action taken thereunder, on the ground that the use is not public. As to those uses, the necessity that they be of a public nature is removed by the constitutional provision. Private ways or roads, drains, and irrigation ditches are the uses which are perhaps most frequently contemplated by these provisions, and with reference to which it is held that the right of the courts to question the existence of a public use does not exist: See Steele v. Madison County, 83 Ala. 304, 3 So. 761; Mobile etc. Ry. Co. v. Postal Tel. Cable Co., 120 Ala. 21, 24 South. 408; People v. Stephens, 62 Cal. 209; People v. Pitkin County District Ct., 11 Colo. 147, 17 Pac. 298; Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989; Barr v. Flynn, 20 Mo. App. 383; Butte etc. Ry. Co. v. Montana etc. Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; State v. Stackhouse, 14 S. C. 417; Ex parte Bacat, 36 S. C. 125, 15 S. E. 204.

In a comparatively recent New York case, however (Matter of Tuthill, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303), the validity of such provisions, even when embodied in the state constitution, is denied; and it is held that a constitutional authorization of the exercise of eminent domain for a purpose theretofore held private by the courts, contravenes the "due process of law" clause of the fourteenth amendment, and cannot deprive the courts of the right to question the existence of a public use. Prior to 1894, it

was held in New York that statutes authorizing land owners to construct, for the drainage of their lands, ditches, dikes, etc., on the land of others, were attempts to employ eminent domain for a private use and were therefore void. In the year mentioned, the state constitution was amended by a declaration authorizing the passage of general laws permitting such drains, under proper restriction and with just compensation, and the case under consideration arose under a law passed in pursuance of this amendment. The court, however, held the amendment in conflict with the fourteenth amendment of the federal constitution. After a review of the cases prior to the date of the passage of the amendment, the court proceeds, speaking through Gray, J.: "I conceive the proper rule of construction to be that, if the amendment expressed a purpose theretofore recognized as public, it would afford that sufficient sanction for subsequent legislation on the subject which might be needed. But if the object had been theretofore deemed not of a public nature or of public concern, and it touches some personal immunity secured by the law of the land, its presence in the constitution will not have the effect of removing the fundamental objection to it. I do not believe that the people of the state can affect or impair the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially of private benefit, and which has always been held to be such. When the amendment says that 'general laws may be passed permitting the owners and occupants of agricultural lands to construct and maintain, for the necessary drainage thereof, necessary drains, etc., it means that the legislature may authorize any such person to take another's land for a purely private purpose, and that is in conflict with the inhibition of the bill of rights and violates the guaranties of the federal constitution. I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative". Compare Matter of Tuthill, 55 N. Y. Supp. 657, 36 App. Div. 492. The validity of the holding has been doubted (see Brannon on The Fourteenth Amendment. 306) and seems opposed to the weight of authority elsewhere.

c. Existence of Public Use Primarily for Legislature.

1. General Rule.—In the absence of constitutional provisions treating certain uses as public or committing the question entirely to the judiciary, the determination whether a certain use is or is not of a public nature, such that it will warrant the exercise of eminent domain, rests primarily and in the first instance with the legislature and not with the courts. The existence of a public use being one of the essentials of a lawful exercise of this power, it is plain that in authorizing its employment the legislature must necessarily determine that such a use exists: In re Madera Irr. Dist., 92 Cal.

298, 27 Am. St. Rep. 106, 28 Pac. 274; Loughbridge v. Harris, 42 Ga. 500; Jockheck v. Shawnee County Commrs., 53 Kan. 780, 37 Pac. 621; Dennis Long & Co. v. City of Louisville, 98 Ky. 67, 32 S. W. 271; Rochester etc. Iron Co. v. Berwind-White Coal etc. Co., 24 Pa. Co. Ct. Rep. 104; Varner v. Martin, 21 W. Va. 534; Chicago etc. Ry. Co. v. Morehouse, 112 Wis. 1, ante, p. 918, 87 N. W. 849; Horton v. Squankum etc. Mort. Co., Fed. Cas. No. 6710.

2. **Legislative Act Need not Expressly Declare Use to be Public.**—Nor is it necessary, in order that the existence of a public use be regarded as having been considered by the legislature that it in terms declare the purpose to be public. The mere passage of the act involves a determination of that question, and is itself a declaration that, in the opinion of the legislature, at least, the use for which the taking is authorized is a public one: Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761; Tuttle v. Moore (Ind. Ter.), 64 S. W. 585; Wellington's Case, 16 Pick. 87, 26 Am. Dec. 631. See, however, Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288.

d. Existence of Public Use Ultimately for Courts.

1. **Legislative Designation not Conclusive.**—The legislative determination is, however, by no means conclusive. A declaration of the legislature, however clearly expressed, cannot, in the nature of things, make that a public use which is essentially private. As is said in Dickey v. Tennison, 27 Mo. 373: "Names do not alter things, and when an act is unconstitutional in its essence, it cannot be made valid by specious names or titles": See to the same effect, Logan v. Stoagsdale, 123 Ind. 372, 24 N. E. 135; Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185; Dayton Gold and Silver Mine Co. v. Seawall, 11 Nev. 394; Coster v. Tide Water Co., 18 N. J. Eq. 54; Apex Transp. Co. v. Garbode, 32 Or. 582, 52 Pac. 573; Appeal of Palairet, 67 Pa. St. 479, 5 Am. Rep. 450.

Conversely, an act will be sustained by the courts if the use for which it authorizes the exercise of eminent domain is public, even although the legislature has itself characterized it as "private." Here again the nature of the use, and not the name which the legislature has affixed to it, controls. The most frequent example of this is that class of acts providing for the construction of roads to the homes of individuals. In many cases these are termed by the legislature "private roads." Where, however, such roads are not in fact "private," but are open to the public generally, they will be regarded by the courts as a public use in spite of their inapt designation by the legislature: See Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; Brewer v. Bowman, 9 Ga. 37; Denham v. Bristol County Commrs., 108 Mass. 202; Towns v. Klamath County, 33 Or. 225, 53 Pac. 604; In re Rhode Island Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591.

2. General Rule.—The ultimate determination whether a use for which the legislature has attempted to employ the power of eminent domain is public or private rests with the judiciary. This necessarily follows from the rule that the constitution and not the legislature is supreme. The constitution is, in theory, a law to the legislature and controls that body as absolutely as it controls the other departments of the government. "How," asks the court in Varner v. Martin, 21 W. Va. 534, "can this control be exerted or made available, if the legislature is the sole judge of the extent of its power in authorizing this exercise of the right of eminent domain? Would not the so holding render the legislature omnipotent in this respect, when the constitution shows it was deemed a dangerous power which needed to be restrained to prevent injustice to the individual citizen? Both reason and authority lead us to the conclusion that the existence or nonexistence of a public use in any given class of cases in which the legislature has authorized private property to be condemned must be determined by the courts."

The rule and its reason are thus tersely expressed by Alvey, C. J., in New Central Coal Co. v. Georges Creek Coal etc. Co., 37 Md. 537: "Whether the use in any particular case be public or private is a judicial question; for otherwise the constitutional restraint would be utterly nugatory, and the legislature could make any use public by simply declaring it so, and hence its will and discretion become supreme, however arbitrarily or tyrannically exercised." The power of the legislature being limited in the exercise of the right of eminent domain to the furtherance of public purposes only, it is for the courts in the exercise of their duty to determine whether the legislature has exceeded its powers, and to restrain it within its legitimate powers. The rule is therefore well settled and is supported by almost innumerable authorities to the effect that it is the right and duty of the court to consider the existence of a public use such that it will justify the employment of eminent domain in its behalf: Sadler v. Langham, 34 Ala. 311; Lorenz v. Jacobs, 63 Cal. 73; In re Madera Irr. Dist., 92 Cal. 298, 27 Am. St. Rep. 106, 28 Pac. 274; Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561; Loughbridge v. Harris, 42 Ga. 500; Hopkins v. Florida etc. Ry. Co., 97 Ga. 107, 25 S. E. 452; Chicago etc. Ry. Co. v. Lake, 71 Ill. 333; Chicago etc. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Waterworks of Indianapolis v. Burkhardt, 41 Ind. 364; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761; Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135; Bankhead v. Brown, 25 Iowa, 540; Jockheck v. Shawnee County Commrs., 53 Kan. 780, 37 Pac. 621; Lake Koen etc. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Tracy v. Elizabethtown etc. R. Co., 80 Ky. 259; Kane v. City of Baltimore, 15 Md. 240; New Central Coal Co.

v. Georges Creek Coal etc. Co., 37 Md. 537; Van Witson v. Guiman, 79 Md. 405, 29 Atl. 608; City of Lowell v. City of Boston, 111 Mass. 154, 15 Am. Rep. 39; Moore v. Sanford, 151 Mass. 285, 24 N. E. 323; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92; Board of Health of Portage Tp. v. Van Hoesen, 87 Mich. 533, 49 N. W. 894; St. Paul etc. Ry. Co. v. State, 34 Minn. 227, 25 N. W. 345; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; Knoblanch v. City of Minneapolis, 56 Minn. 321, 57 N. W. 928; Stewart v. Great Northern Ry. Co., 65 Minn. 515, 68 N. W. 208; Paxton etc. Co. v. Farmers' etc. Land Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343; Concord R. R. Co. v. Greely, 17 N. H. 47; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Coster v. Tide Water Co., 18 N. J. Eq. 54; Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 311; In re Deansville Cem. Assn., 66 N. Y. 569, 23 Am. Rep. 86; In re Niagara Falls etc. Ry. Co., 108 N. Y. 375, 15 N. E. 429; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; In re City of New York, 135 N. Y. 253, 31 Am. St. Rep. 825, 31 N. E. 1043; Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468; McQuillen v. Hatton, 42 Ohio St. 202; Dalles Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78; Fanning v. Gilliland, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; Smedly v. Erwin, 51 Pa. St. 445; Appeal of Palairet, 67 Pa. St. 479, 5 Am. Rep. 450; In re Rhode Island Suburban Ry. Co., 22 R. I. 457, 48 Atl. 590, 591; Ryan v. Louisville etc. Co., 102 Tenn. 111, 50 S. W. 744; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Baltimore etc. R. Co. v. Pittsburgh etc. Ry. Co., 17 W. Va. 812; Varner v. Martin, 21 W. Va. 534; Pittsburgh etc. Ry. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453; Smith v. Gould, 59 Wis. 631, 18 N. W. 457; Wisconsin Water Co. v. Winans, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361; Weidenfeld v. Sugar Run Ry. Co., 48 Fed. 615; Horton v. Squankum & Freehold Mort. Co., Fed. Cas. No. 6710.

e. Presumption in Favor of Legislative Determination that Public Use Exists.

1. General Rule.—The legislative determination of the existence of a public use, while not conclusive on the courts, has every reasonable presumption of validity in its favor, and it is only in a clear case that it will be disregarded by the courts and the act be held unconstitutional. As is said in United States v. Gettysburgh Electric Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427: "Every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably."

2. Where Act is Capable of Two Constructions.—If, therefore, the act is capable of two reasonable constructions, under one of

which it would provide for a purely private use, while by the other it would be sustainable as employing the power of eminent domain in behalf of a public use, the latter construction will be adopted by the courts. "Where one construction of a statute will make it void for conflict with the constitution, and another would render it valid, the latter, if not a forced and unreasonable one, will be adopted, although the former, at first view, is otherwise the more natural interpretation of the language used": Stewart v. Great Northern Ry. Co., 65 Minn. 515, 68 N. W. 208. To the same effect are Miller v. Colonial Forestry Co., 73 Conn. 500, 48 Atl. 98; Paxton etc. Land Co. v. Farmers' etc. Land Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343; Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 311.

3. **Where Publicity of Use is Doubtful.**—So, if it becomes a question whether a particular use, for the furtherance of which the legislature has authorized the employment of eminent domain is public in its nature, the opinion of the legislature will prevail over any mere doubt of the court. "Where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in this regard": Consolidated Channel Co. v. Central Pac. R. R. Co., 51 Cal. 269. See to the same effect, Sadler v. Langham, 34 Ala. 311; City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Chicago etc. Ry. Co. v. Lake, 71 Ill. 333; Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761; Tuttle v. Moore (Ind. Ter.), 64 S. W. 585; Bankhead v. Brown, 25 Iowa, 540; Hazen v. Essex Co., 66 Mass. (12 Cush.) 475; Dietrich v. Murdock, 42 Mo. 279; Brown v. Keener, 74 N. C. 714; Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Varner v. Martin, 21 W. Va. 534; Chicago etc. Ry. Co. v. Morehouse (principal case), 112 Wis. 1, ante, p. 918, 87 N. W. 849; United States v. Gettysburgh Electric Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. Rep. 43.

4. **Strength of Presumption.**—In many cases the stress laid by the courts upon the presumption of validity of legislative acts have led them to the use of expressions, which, if they are to be taken literally, are undoubtedly too strong. Thus, in Hazen v. Essex Bank, 12 Cush. 475, Mr. Chief Justice Shaw, speaking for the court, uses the following language (quoted with apparent approval in the opinion of the principal case, ante, p. 922): "If a public use is declared, it will be so held, unless it manifestly appears that they can have no tendency to advance and promote such public use." It is likewise frequently said that the legislative act will be held valid unless it appears "beyond a reasonable doubt" that the use is private. With reference to this expression the supreme court of West Virginia, speaking through Judge Green, says in Varner v. Martin, 21

W. Va. 534: "In some cases it has been said that before the courts declare an act of the legislature void it should be shown to be unconstitutional beyond all reasonable doubt. Perhaps this really means no more than we have said, that before declaring an act of the legislature void, its unconstitutionality should be clear to our minds. But the use of this phrase, 'beyond all reasonable doubt,' seems to me to be very inappropriate in such a connection and to be well calculated to produce mischief." After showing that the phrase is applicable particularly to the amount of evidence necessary to overcome the presumption of innocence in criminal cases, the court shows that, as there understood, it is entirely inappropriate when used in the connection now under consideration. The opinion proceeds: "We cannot raise presumptions in favor of legislative infallibility as strong as those of a jury in favor of the innocence of a prisoner charged with murder. While we concede that it is the duty, as it is doubtless the pleasure, of both the legislative and judicial departments of the government to presume that the other will keep within the bounds of constitutional authority, yet that presumption is not only not conclusive but it is not so strong as to prevent a free and full inquiry into the subject; nor should we in the indulgence of this presumption forget that there is committed to us, equally with the legislative department, the trust of guarding and protecting the life, liberty, and property of the citizens as guaranteed by the constitution." Similar language is used by Holmes, C. J., in Woodward v. Central Vt. Ry. Co. (Mass.), 62 N. E. 1051: "Every reasonable presumption is to be made in favor of the validity of the act, ... but we cannot invent fictions to save acts of the legislature."

f. Inquiry into Ulterior Motives and Purposes.

1. Of Legislature.—It not infrequently occurs that an act of the legislature is presented to the courts, authorizing the employment of eminent domain for a purpose which, as set forth in the act, is admittedly public, but which it is claimed is not, in fact, the purpose sought to be accomplished by it. In such case the question arises as to the power of the courts to go behind the purposes named in the act and ascertain whether, as a matter of fact, they are the ones contemplated by the legislature.

So far as concerns an act of the legislature, the declaration therein of the uses for which it is sought to condemn private property, is, it seems, conclusive on the courts. In applying this principle in a similar connection (taxation) the following language is used by the New York court of appeals (in Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345, 28 N. E. 358): "The judicial department cannot institute an inquiry concerning the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing or

impairing in some measure the powers and functions assigned by the constitution to each department of the government. The courts cannot determine upon the testimony of witnesses that the purpose of the legislature was to appropriate public money for the benefit of an individual, when it has expressed its purpose in the bill itself to be the enlargement or improvement of the canal. They must assume that the legislature acted in good faith and meant just what it said, though it may be possible to show, outside of the language and terms of the bill, that in fact all or the larger part of the benefits following the expenditure may or will be reaped by a few individuals. Reason and authority, as well as the fitness of things, demand that where an act of the legislature appropriating money is assailed upon the ground that the purpose of such appropriation is local and private and not public, the question shall be determined by the language and general scope of the act."

2. Of Municipal Corporation.—In Matter of City of Buffalo, 15 N. Y. Supp. 123, 39 N. Y. St. Rep. 417, the rule above laid down as applicable to legislative acts is applied to proceedings undertaken by a city council to condemn land, avowedly for a public street, but, it was claimed, actually to enable it to carry out an ultra vires contract with a railroad company, and for railroad purposes. The court held that the municipal council was a legislative body, the ulterior motives and purposes of which could not be inquired into by the court, distinguishing between these and the purpose declared in the ordinance.

In Ligare v. City of Chicago, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934, however, a contrary view is taken. The authority of a municipal council is there regarded as a delegated power, exercisable only for the purposes authorized by the statute delegating it. Where, therefore, it was shown that condemnation proceedings begun under an ordinance which declared the object of the taking to be the widening of a public street, but which, in fact, was to condemn property for a railroad track, the proceedings were held invalid. The court says: "The substance is not to be lost sight of through any mere jugglery in the use of words. This proceeding is in fact not for the city but for the railroad companies. Between condemning for the railroad companies and condemning for the city to then give to the railroad companies, there is, in legal effect, and so far as concerns this case, no difference—they are precisely the same thing." See, also, Nalle v. City of Austin (Tex. Civ. App.), 21 S. W. 375. The same is held in Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, where an ordinance, professedly establishing harbor lines, was in fact shown to have been passed, and the proceedings under it to have been prosecuted, in order that the view of a new and expensive bridge might remain unobstructed. The case is, however, distinguishable on the ground that the ulterior purpose was there expressed upon the very records which showed authority for the proceedings.

3. **Of Private Corporations.**—As to private corporations seeking to condemn lands under general laws passed for that purpose, the rule is well settled that, while the declarations of the corporation are assumed to be true unless disproven (Lake Koen etc. Irr. Co. v. Klein, 63 Kan. 484, 65 Pac. 684), in determining whether the use is public or private courts are not confined to the description of the objects and purposes of the corporation as set forth in the articles of incorporation, but may resort to evidence aliunde showing the actual business proposed to be conducted by it. There is in such case no question of a conflict between the legislature and the judiciary nor of any inquiry by the latter into the good faith of the former. The question is simply whether the corporation seeking to condemn private property has made a sufficient showing of a public use. This is, of course, for the courts to determine, and is to be determined in view of all the facts before the court: Lake Koen etc. Irr. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; In re Niagara Falls etc. Ry. Co., 108 N. Y. 375, 15 N. E. 429; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790. See, however, Kansas etc. Coal Ry. Co. v. Northwestern Coal etc. Co., 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684.

g. **Questions of Expediency, Propriety, etc., for Legislature.**—In determining the right of the courts to question the existence of a public use, it is all important that the distinction between the nature of a use, and the propriety or expediency of the exercise of eminent domain in its behalf be kept in mind. Whatever conflict exists as to the right of the courts in the last instance to determine whether a public use does or does not exist has arisen from a failure thus to distinguish these two questions: See Sadler v. Langham, 34 Ala. 311; and monographic note to Beekman v. Saratoga etc. Ry. Co., 22 Am. Dec. 679, 691.

The existence of a public use such that it will justify an exercise of the right of eminent domain is, as we have seen, a judicial question. Once, however, it is determined that a public use exists, the question whether it is wise or expedient that eminent domain be employed in its furtherance is no concern of the courts. This is a political question to be determined by the legislature and its action in this regard is not reviewable by the courts. Whether the public exigencies demand the proposed work, whether the extent of benefit to the public justifies the taking of private property in its behalf, whether the same result might not be otherwise better accomplished, are all questions the determination of which by the legislature is final: Sadler v. Langham, 34 Ala. 311; Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; In re Hartford etc. Ry. Co. (Conn.), 51 Atl. 943; Chicago etc. Ry. Co. v. Lake, 71 Ill. 333; Waterworks of Indianapolis v. Burkhardt, 41 Ind. 364; Tuttle v. Moore (Ind. Ter.), 64 S. W. 585; Bankhead v. Brown, 25 Iowa, 540; Creston W. W. Co. v. McGrath, 89 Iowa, 502, 56 N. W. 680; Jockheck v. Shawnee County

Commrs., 53 Kan. 780, 37 Pac. 621; Tracy v. Elizabethtown, 80 Ky. 259; Riche v. Bar Harbor Water Co., 75 Me. 91; New Central Coal Co. v. Georges Creek Coal etc. Co., 37 Md. 537; Van Witson v. Gutman, 79 Md. 405, 29 Atl. 608; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92; Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437; Swan v. Williams, 2 Mich. 427; Weir v. St. Paul etc. Ry. Co., 18 Minn. 155; St. Louis Co. Ct. v. Griswold, 58 Mo. 175; Simpson v. City of Kansas City, 111 Mo. 237, 20 S. W. 38; Joplin etc. Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406; Paxton etc. Land Co. v. Farmers' etc. Land Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343; In re Mt. Washington Road Co., 35 N. H. 134; Coster v. Tide Water Co., 18 N. J. Eq. 54; Central Ry. Co. v. Pennsylvania Ry. Co., 31 N. J. Eq. 475; Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 311; In re Fowler, 53 N. Y. 60; In re Burns, 155 N. Y. 23, 49 N. E. 246; Beekman v. Saratoga etc. Ry. Co., 3 Paige, 45, 22 Am. Dec. 679; Hartwell v. Armstrong, 19 Barb. 166; Harris v. Thompson, 9 Barb. 350; Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468; Giesy v. Cincinnati etc. Ry. Co., 4 Ohio St. 308; Dalles Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78; Bridal Veil etc. Co. v. Johnson, 30 Or. 205, 60 Am. St. Rep. 618, 46 Pac. 790; Apex Transp. Co. v. Garbade, 32 Or. 582, 52 Pac. 573; Smedley v. Erwin, 51 Pa. St. 445; Appeal of Rees (Pa.), 12 Atl. 427; South Carolina R. Co. v. Blake, 9 Rich. 228; Ryan v. Louisville etc. Terminal Co., 102 Tenn. 111, 50 S. W. 744; Williams v. School Dist. No. 6, 33 Vt. 271; Tyler v. Beache, 44 Vt. 648, 8 Am. Rep. 398; Plecker v. Rhodes, 30 Gratt. 795; Tait v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Salt Co. v. Brown, 7 W. Va. 191; Ford v. Chicago etc. Ry. Co., 14 Wis. 609, 80 Am. Dec. 791; Smeaton v. Martin, 57 Wis. 364, 15 N. W. 403; Smith v. Gould, 59 Wis. 631, 18 N. W. 457.

h. Necessity of Taking Particular Piece or Certain Amount of Land.

1. Doctrine that Legislature is Sole Judge of.

A. In General.—In most of the cases last cited the statement is made that the "necessity" of the exercise of the right is for the legislature alone to consider. The statement is undoubtedly true when confined, as is said in Creston Waterworks Co. v. McGrath, 89 Iowa, 502, 56 N. W. 680, "within proper restrictions." What is meant in the majority of cases is merely that it is for the legislature to judge of the wisdom and propriety of authorizing the exercise of eminent domain in a particular case, and such is undoubtedly the law.

B. As to Quality of Estate.—Likewise it is said that it is for the legislature to determine what interest or estate in the land taken would best promote the public use, or, as it is frequently put, is "necessary." If, according to this view, the legislature, in the ex-

ercise of its discretion, determines that an estate in fee simple shall be taken, it is not permitted to the courts to determine that a right of way, or other estate less than fee simple is all that is required. "It is well settled that it is within the competency of the legislature, in authorizing land to be condemned for a public use which may be permanent, to determine what estate shall be taken, and to authorize the taking of a fee or any lesser estate in its discretion, and that a fee may be taken although the public use for which the land is to be taken is special and not of necessity permanent or perpetual. There is no other restraint upon the power of the legislature to authorize land to be taken for public use, except that which imposes the condition of making compensation to the owners. When the statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that in the judgment of the court the taking of an easement only would accomplish the public purpose which the legislature had in view. That is a legislative and not a judicial question": Sweet v. Buffalo etc. Ry. Co., 79 N. Y. 293. To the same effect, Waterworks of Indianapolis v. Burkhardt, 41 Ind. 364; Challiss v. Atchison etc. Ry. Co., 16 Kan. 117; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. Rep. 43; De Varaigne v. Fox, 2 Blatchf. 95, Fed. Cas. No. 3836.

C. As to Amount of Land.—Similar language has been used with reference to the amount of land which may be taken under the power of eminent domain. "As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain, so it is the exclusive judge of the amount of land and of the estate in land which the public end to be subserved requires shall be taken": Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325. See, also, to the same effect, Waterworks Co. of Indianapolis v. Burkhardt, 41 Ind. 364; Wisconsin Central Ry. Co. v. The Cornell University, 52 Wis. 537, 8 N. W. 491; Shoemaker v. The United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361.

2. Contrary Doctrine.—The determination of the legislature that a particular piece of property or particular amount of land is necessary for a certain public use is undoubtedly entitled to great weight and (except, perhaps, in Louisiana—see Lecane v. Police Jury of St. James' Parish, 20 La. Ann. 308; New Orleans Pac. Ry. Co. v. Gay, 32 La. Ann. 471) is, in the absence of cogent evidence to the contrary, conclusive: Parham v. Justices, 9 Ga. 341; Tracy v. Elizabethtown etc. Ry. Co., 80 Ky. 259. To hold, however, that such determination is in no case reviewable by the courts, is to confuse two matters in their nature separate and distinct, and is, in effect, a practical annulment of the rule that the courts may restrict the exercise of the power to the furtherance of public uses. It is one thing to say that the legislature is the sole judge of whether or not

the public exigencies warrant or necessitate the furtherance of a particular public use by the employment of the power of eminent domain, and it is quite another thing to say that the legislature is the sole judge of whether a particular piece of property subserves that public use or is in any way necessary to its furtherance. In both some question of "necessity" is present, but to confuse the two for this reason is to add another to what is termed in In re City of Buffalo, 15 N. Y. Supp. 123, 39 N. Y. St. Rep. 417, the "multitudinous body of erroneous reasonings, where the error originates in and is continued by the ambiguous use of terms": See, also, in this connection, monographic note to Lynch v. Forbes, 42 Am. St. Rep. 406.

In effect, such a rule would permit of the exercise of eminent domain for purely private uses. If the courts could not limit the legislature to such land as is reasonably necessary or subservient to the public use, a public use of the most insignificant proportions would support an appropriation of land practically unlimited in extent. It is obvious that to the extent that eminent domain is employed over and above that reasonably necessary for the public use, it is employed for a purpose not public but private. If but two acres are reasonably necessary for a depot site and two hundred acres are condemned therefor, the condemnation of one hundred and ninety-eight acres is, it would seem, wholly unsupported by any showing of a public use. On principle, no distinction appears between such a case and a case where the same amount of land is sought to be taken in behalf of a purely private use.

On authority, moreover, the rule that the legislature is subject to control by the courts in this regard seems preferable. In Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259, it is said that: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use, or the necessity to the use of any particular property. Even where it is conceded that the use is public, the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions: 1. That just compensation shall be made; and 2. That the property desired to be condemned will conduce, to some extent, to the accomplishment of the public object to which it is to be devoted. It is not necessary to elaborate the consequences which would flow from the doctrine that a corporation or the legislature should conclusively determine, whether right or wrong, either of these questions, or to expose the inefficiency of the constitutional guaranty of the right to private property by citing instances where it might be taken, if such were the law, for private use." There is undoubtedly a conflict of authority upon this point, but such would seem to be the rule sustained by the weight of the better considered cases and the only one sustainable on principle: Parham v. Justices etc., 9 Ga. 341; Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; St. Paul etc. Ry.

Co. v. State, 34 Minn. 227, 25 N. W. 345; Giesy v. Cincinnati etc. Ry. Co., 4 Ohio St. 308; Stearnes v. City of Barre, 73 Vt. 281, 50 Atl. 1086; Weidenfeld v. Sugar Run Ry. Co., 48 Fed. 615; Kaukauna Water Power Co. v. Green Bay etc. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173. See, also, In the Matter of Albany Street, 11 Wend. 148.

3. **Where Constitution Limits Taking to Extent of Necessity.**—The courts undoubtedly have the right to question the existence of a public use for a particular piece of land, on the ground that no necessity exists for the taking, in those states the constitution of which authorize the exercise of eminent domain "as necessity requires." The constitution of Vermont contains such a provision, and, it is said, in Stearns v. City of Barre (Vt.), 50 Atl. 1086, "in effect, declares that private property can be taken by the public only when it is necessary for its use." "Of what avail," asks the court, "is this constitutional guaranty, if there can be no judicial inquiry as to the necessity? The very existence of the provision makes the question of necessity a judicial one. If it does not, the legislature remains supreme in this regard notwithstanding the constitution. If a legislative determination of the question of necessity would be conclusive in the absence of the constitutional provision, that provision, if it is to have any effect whatever, must deprive the legislative determination of its conclusive character."

III. Where Legislature has Delegated Power to Exercise Eminent Domain for Public Uses.

a. As to Nature of Use.—The second class of cases mentioned at the beginning of this note is that in which the validity of the legislative act is admitted to be for a public use, and the only question before the court is whether or not the party has brought himself within its provisions. So far as the right of the courts to consider the public nature of the use, this class of cases has given rise to no questions which call for consideration. Whether a public use exists, such that the statute authorizes the exercise of eminent domain in its behalf, depends in each case upon the particular facts of the case before the court. The function of the court is, in such case, merely the application of the statute to the facts presented, and the right of the court to determine whether a public use within the statute has been established has not, it is believed, ever been questioned.

b. Necessity of Taking Particular Piece or Certain Amount of Land.

1. **In General.**—From what has already been said, however, it is apparent that the determination of the question of the necessity of taking a particular piece or a certain amount of land is in fact a determination of the existence of a public use with reference to that land. It remains to consider, therefore, those cases in which

the decision as to the necessity of taking certain land is not exercised directly by the legislature, and to determine when the courts may question the existence of such necessity.

2. **Constitutional Provisions.**—By the constitution of Michigan, "when private property is taken for the use and benefit of the public, the necessity of using such property, and the just compensation to be made therefor," is required to be ascertained by a jury of twelve freeholders or by commissioners appointed by a court of record. Under this provision it is held that any legislation which does not plainly require the question of necessity to be left to a jury is unconstitutional and void: Power's Appeal, 29 Mich. 504. The jury having determined this question, the courts will not review their action further than to determine that there was evidence to support the verdict: Saginaw etc. Ry. Co. v. Bordner, 108 Mich. 236, 66 N. W. 62; Toledo etc. Ry. Co. v. Dunlap, 47 Mich. 457, 11 N. W. 271; Port Huron etc. Ry. Co. v. Voorhies, 50 Mich. 506, 15 N. W. 882. See, also, Paul v. Detroit, 32 Mich. 108; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; Toledo etc. R. Co. v. East Saginaw, 72 Mich. 206, 40 N. W. 436. Even in the absence of a constitutional provision the legislature may, it is well settled, delegate the determination of the question of public utility or necessity to a jury: Avery v. Police Jury of Iberville, 12 La. Ann. 554.

3. **Under Power to Take Necessary Lands.**

A. **In General.**—The most frequent class of cases, however, in which the right of the courts to question the necessity for taking a certain amount or a particular piece of property arises, is that in which the legislature has authorized a private or municipal corporation to take "all necessary" lands or "such lands as may be required." Whether in such case the final determination of the necessity is with the courts or with the body to which the right of eminent domain has been delegated is a question concerning which the authorities are somewhat conflicting.

Many of the cases which apparently lay down the doctrine that the legislature may authorize a corporation to finally determine this question in reality simply hold that the legislature may delegate to the persons authorized to employ eminent domain the right of determining when the public exigencies require it. Thus, it is held that there is no objection to the legislature providing for the construction of railroads and authorizing the employment of eminent domain in their behalf, by a general law, even though the effect of such action is to leave "the determination of the necessity to those who are to exercise the right." Such was the case of Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475.

B. **Massachusetts Doctrine.**—In Massachusetts, however, the doctrine seems to be settled that, even under a statute authorizing the taking of "necessary" land, the determination of the necessity

of appropriating a particular piece of land rests with the persons to whom the exercise of the right of eminent domain is delegated by the legislature. Thus, it is said in Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437, that: "There is no constitutional right on the part of the land owner in this state to have the question of the necessity or expediency of the taking in any particular instance submitted to a court or jury. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the state has delegated the authority to take." In the monographic note to this case, Lynch v. Forbes, 42 Am. St. Rep. 406, the inconsistency of certain statements in the opinion is commented upon, and the case is said to be in conflict with the "almost overwhelming preponderance of authority."

The effect of such a rule is well expressed in South Carolina R. R. Co. v. Blake, 9 Rich. 228, as follows: "If land taken professedly for a public purpose is vested absolutely in a private agent, what is not needed for the purpose becomes his; to authorize him to take whatever he may say the purpose needs is to subject the right of property to his good pleasure, and finally to rest the eminent domain upon private interest instead of public good."

C. Discretion Allowed Donee of Power.—It is, of course, true that a reasonable discretion must be allowed those to whom the power is delegated of determining the location and amount of land necessary for the proper consummation of the use in behalf of which the legislation has empowered them to employ eminent domain. "Every company seeking to condemn land for public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose": Smith v. Chicago etc. Ry. Co., 105 Ill. 511. To the same effect, McKennon v. St. Louis etc. Ry. Co., 69 Ark. 104, 61 S. W. 383; Chicago etc. Ry. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; O'Hare v. Chicago etc. Ry. Co., 139 Ill. 151, 28 N. E. 923; Stark v. Sioux City etc. Ry. Co., 43 Iowa, 501; In Matter of New York etc. R. R. Co., 77 N. Y. 248.

D. General Rule.—By the great weight of authority, however, the courts have in such case the ultimate power of restricting the exercise of eminent domain to the actual reasonable necessities of the case. In most of the decided cases the holding is put upon the ground that by authorizing a taking of "necessary lands," the legislature restricted it to such and made the court, rather than the donee of the power, the judge of the necessity. Thus, it is said in Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325: "It is often laid down as the law that the taking of property must always be limited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that it is almost invariably said, not in discussing the extent of

the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or a particular estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied."

It is true that these cases may well be sustained upon the ground above given—that the legislature restricted the taking to the legitimate needs of the case and impliedly made the court the judges of the existence of such needs. But in so far as the passage just quoted implies that the legislature might take lands not actually necessary for a public use, it is opposed to what appears to be the better rule, and that supported by the weight of authority: See supra, pp. 941, 945. At any rate, the rule is quite well settled that in the cases under consideration the determination of the necessity of taking a particular piece or a certain amount of land rests ultimately with the courts: People v. Blake, 19 Cal. 579; Spring Valley W. W. Co. v. San Mateo W. W. Co., 64 Cal. 123, 28 Pac. 447; Reed v. Louisville Bridge Co., 8 Bush, 69; Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; St. Paul etc. Ry. Co. v. State, 34 Minn. 227, 25 N. W. 345; Central R. R. Co. v. Pennsylvania Ry. Co., 31 N. J. Eq. 475; Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 311; Kountze v. Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; Matter of New York Cent. etc. Ry. Co., 66 N. Y. 407; Rensselaer etc. Ry. Co. v. Davis, 43 N. Y. 137; South Carolina Ry. Co. v. Blake, 9 Rich. 228; Stearns v. City of Barre, 73 Vt. 281, 87 Am. St. Rep. 721, 50 Atl. 1086; Baltimore etc. Ry. Co. v. Pittsburgh etc. Ry. Co., 17 W. Va. 812; Wisconsin Cent. Ry. Co. v. Cornell University, 52 Wis. 537, 8 N. W. 491; Kaukauna Water Power Co. v. Green Bay etc. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173; and monographic note to Lynch v. Forbes, 42 Am. St. Rep. 406.

SARGENT v. CENTRAL ACCIDENT INSURANCE CO.

[112 Wis. 29, 87 N. W. 796.]

INSURANCE, ACCIDENT — UNNECESSARY EXPOSURE TO DANGER.—In the absence of circumstances of peril, a person who places his person in front of the muzzle of his gun, loaded and cocked, as he reaches for it to draw it toward him through a fence, "unnecessarily exposes himself to danger," within the meaning of an accident insurance policy excluding from the risk disability arising from such exposure. (p. 947.)

Swett & Ecke, for the appellant.

C. E. Hooker, for the respondent.

[30] DODGE, J. The circumstances of plaintiff's injury are established wholly by his own testimony and statements. He was hunting, with two companions, who were on the other side of a fence and not in sight of him. Desiring to join [31] them, he leaned his gun against the fence, and climbed over His testimony in chief as to the accident was in the following words: "I went to get over the fence, and put my gun up by the fence, and after I got over the fence the accident happened. How it occurred, I don't know. I must have reached for the gun. My right hand was shot off at the wrist." On cross-examination he said, "I had no idea how I got hold of the gun, or how it happened at all." In his notice and proofs of loss he makes the statement, "I had just climbed over a fence, and in reaching for my gun it accidentally discharged, the shot entering my right wrist," requiring the amputation of the right hand. It appeared without contradiction that the gun was at full cock before its discharge.

The force and effect of the clause in the policy excepting the defendant from liability for injuries due to unnecessary exposure to danger has received authoritative construction in this court in Shevlin v. American etc. Assn., 94 Wis. 180, 68 N. W. 866, where it is held to be satisfied by the same act that would constitute contributory negligence, and a distinction is drawn between the expression present in this policy and the expression a "voluntary or willful exposure to unnecessary danger," the latter being construed to describe gross negligence, in the sense of a conscious exposure to a known peril. Applying the law of this case to the facts disclosed by the plaintiff's own uncontradicted and unqualified description of the event, there is no room for difference of opinion as to what transpired, nor for different inferences therefrom as to the existence of that negligence which constitutes an unnecessary exposure to danger. From the accident itself there can, of course, be no doubt that plaintiff placed his wrist in front of the muzzle of his gun, loaded and cocked, as he reached for it to draw it toward him through the fence. This was, of course, unnecessary. It is always possible, if one must draw a loaded gun through a fence, to refrain [32] from placing any portion of his person in front of the muzzle. Such exposure is of itself negligence of the most obviously inexcusable kind; not the conduct which the uniform experience of mankind teaches may be expected from the man of ordinary prudence. Whether, indeed, there might be circumstances of excitement, haste, or other

peril so imminent and engrossing as to force one's attention away from the danger incurred by conduct like the plaintiff's is a question analogous to that discussed in some of the railroad crossing cases (Guhl v. Whitcomb, 109 Wis. 69, 74, 83 Am. St. Rep. 889, 85 N. W. 142), but one which need not be considered here as none of such circumstances are suggested to have been present. The finding of the circuit court that plaintiff's injury did not result from unnecessary exposure to danger is not only antagonized by the great preponderance of the testimony; it is conclusively negatived by all the testimony, and the only reasonable inference therefrom. It must, therefore, be set aside, and a contrary finding on that subject substituted for it.

Other questions passed upon by the court below and argued before us are by the foregoing conclusion rendered wholly immaterial. Judgment for the defendant necessarily results from the foregoing change in the findings.

By the Court. Judgment reversed, and cause remanded with directions to render judgment for the defendant.

Accident Insurance.—Voluntary exposure to unnecessary danger means conscious or intentional exposure to such danger: De Loy v. Travelers' Ins. Co., 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; Johnson v. London Guarantee etc. Co., 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115. The burden is on the insurer to show that an injury is due to such exposure: Follis v. United States Mut. Acc. Assn., 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807; Conboy v. Railway etc. Assn., 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363. One who is hunting is not guilty of voluntary exposure to unnecessary danger, so as to preclude his recovery when injured by the accidental discharge of his gun, brought about by his foot slipping while he is climbing a bank and his drawing himself up by means of a limb: Cornwell v. Fraternal etc. Assn., 6 N. Dak. 201, 66 Am. St. Rep. 601, 69 N. W. 191.

ULLMAN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[112 Wis. 150, 88 N. W. 41.]

CARRIERS—CONTRACTS LIMITING LIABILITY—VALUATION AS BASIS.—A common carrier may, by contract made with the shipper, on a value basis of the subject of transportation, limit liability for loss or damage through his negligence to actual loss upon such basis. The agreed value may be either the maximum or actual value of the property. (pp. 949, 950.)

CARRIERS—BILLS OF LADING—SHIPPER'S ASSENT TO TERMS OF.—If a bill of lading issued by a carrier states the value of the property received for shipment, or the maximum value thereof, the shipper, by receiving such bill of lading without objection, thereby assents to the value of the property delivered as stated therein. (p. 950.)

CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier cannot, by contract, avoid entirely the common-law liability for his negligence in the carriage of property, nor arbitrarily limit his liability in case of loss by negligence, without regard to the value of the property, but he may by contract liquidate such loss or damage in advance upon an actual or maximum value basis agreed upon and stated in the contract. (pp. 950, 952.)

CONTRACTS—CONSTRUCTION.—If a particular use of a word becomes common, that use must be taken into consideration in construing a contract, regardless of whether its meaning can be found in any lexicon or not. (p. 958.)

CARRIERS—BILL OF LADING—MEANING OF WORD "ACCIDENT."—The word "accident," when used in a bill of lading as referring to events involving damage to the property carried for which the carrier is to be liable, includes the result of any human fault which constitutes actionable negligence. Such word is not synonymous with "mere accident" or "purely accidental," and means directly the opposite. (pp. 958, 959.)

CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may, in consideration of a special freight rate or other valuable consideration, contract for exemption from liability as an insurer for loss or damage to property carried not caused by negligence or willful misconduct. (p. 959.)

CARRIERS—LIMITATION OF LIABILITY.—A common carrier may by contract fix the measure of its liability for negligence on a value basis of the property carried. (p. 960.)

E. M. Hyzer, for the appellant.

D. G. Classon, for the respondent.

155 MARSHALL, J. The learned trial court correctly decided that if appellant and respondent, when their contract was made, as a part thereof fairly agreed upon the value of the horse as a basis for the charges for transporting it and responsibility for its safety in respect to dangers from neg-

ligence on the part of the carrier, such agreement was valid and limited the right of respondent to the recovery of one hundred dollars and interest. That is the settled law, notwithstanding in a few jurisdictions such doctrine is not recognized; and it applies where the maximum, as well as where the actual, value is agreed upon. The leading case on the subject is Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151. The principles there declared have been adopted in most of the states of the Union, including this state (Loeser v. Chicago etc. Ry. Co., 94 Wis. 571, 69 N. W. 362; Schaller v. Chicago etc Ry. Co., 97 Wis. 31, 71 N. W. 1042), and are not in conflict with anything said or decided in Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55. There is a wide difference between an agreement exempting a carrier from the liability which the common law imposes, and one fixing a value basis for charges for transportation of and responsibility for property [156] intrusted to its care. The former is universally condemned; the latter, when fairly made, is, as a general rule, upheld. The limitation indicated, upon the power of parties to contract, rests on grounds of public policy which cannot reasonably be said to require any restraint upon the right to fairly gauge charges for services and risk by a property value basis.

But it is said there was no agreement between the parties to the transaction in this case as to the value of the horse as a basis for the contract of carriage. The trial court so decided, holding the contract in question to be the same, in all essential particulars, as a stipulation against any liability for loss of the subject of carriage or damage thereto through negligence of the carrier, or liability for any such loss in excess of a stipulated amount having no regard to the value of the property; and further, as we understand it, that an agreement upon the maximum value is not a compliance with the condition of the right to vary common-law responsibility. A careful reading of the opinion in Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780, will show that the decision turned on the general doctrine that a common carrier cannot make a valid contract avoiding altogether the common-law liability for the result of his negligence, or arbitrarily limiting his liability in case of loss by negligence. There was nothing in the contract there considered indicating that the limitation of liability agreed upon was made with reference to the value of the property. There was simply an arbitrary stipula-

tion against liability in excess of a certain sum named. We are unable to agree with the trial court that the stipulation in the contract before us was of that character, or that it does not contain an agreement as to the value of the horse for the purposes of its transportation. The statement therein of the declared value of the horse, by the shipper, being one hundred dollars, the delivery and acceptance of the property for shipment pursuant thereto, and the acceptance by the shipper of the bill of lading, clearly amounted to an [157] agreement between the parties that the value of the property was as indicated: Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151.

The learned trial court said, in his opinion, that the contract did not name the value of the property or contain any agreement on that subject, but was a simple declaration limiting liability. Since the contract named one hundred dollars as the value of the horse, and so referred thereto as to clearly indicate an intention to thus place a maximum value upon the property, we are led to believe, as before indicated, that it was supposed by the court that, owing to the failure to specify a certain instead of a maximum value, there was no agreement as to value within the doctrine permitting common carriers to limit their liability by charging for their service on the basis of an agreed value of the subject of carriage, and that in the Abrams case it was so decided. We do not so understand that case.

There are three well-recognized classes of cases in the books on the subject under consideration: 1. Those where the parties agreed upon the value and limited the liability of the carrier accordingly: Coupland v. Housatonic Ry. Co., 61 Conn. 531, 23 Atl. 870; Brehme v. Dinsmore, 25 Md. 328; Graves v. Lake Shore etc. R. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Hill v. Boston etc. R. R. Co., 144 Mass. 284, 10 N. E. 836; Zimmer v. New York Cent. etc. R. R. Co., 137 N. Y. 460, 33 N. E. 642. 2. Those where the stipulation fixed a maximum value of the property and it was agreed that in case of loss the recovery should not exceed such value. The great majority of cases belong to this class and in the main refer to Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, which was such a case. The following are of the same character: Alair v. Northern Pac. Ry. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072; J. J. Douglass Co. v. Minnesota

Transfer Ry. Co., 62 Minn. 288, 64 N. W. 899; Belger v. Dinsmore, 51 N. Y. 166; Muser v. Holland, 17 Blatchf. 412, 1 Fed. 382; Railway Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Starnes v. Railroad Co., 91 Tenn. 516, 19 S. W. 675; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328; Richmond etc. R. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749; Ballou [158] v. Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881; 3. Cases where the contract either exempted the carrier altogether from liability for the result of negligence, or such liability was limited to a certain sum arbitrarily fixed, that is, having no reference to the actual value of the property. Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780, belongs to this class, and it is so placed in the note to the text on the subject in 4 Elliott on Railroads, section 1510.

Most of the conflicts that are supposed to exist in the decisions are confined to this third class of cases. It has often been a question whether an amount stated as the limit of the carrier's liability was inserted in the contract merely for the purpose of such limitation, or for the purpose of measuring the responsibility by the actual value of the property. That question has been a subject for consideration where the word "value" was used in connection with the limit placed upon recoverable loss, as well as where neither that word nor anything equivalent thereto was used, as in the Abrams case. For examples we cite the following: In Harvey v. Terre Haute etc. R. R. Co., 74 Mo. 538, the property carried was a horse. This language was used in the bill of lading: "Value, if injured or killed, one hundred dollars." The contract was sustained because the court, viewing it from the standpoint of the parties at the time it was made, held that it contained an agreement that the value of the horse was the sum named, and indicated that the contract of carriage was made fairly upon that basis. In Louisville etc. R. R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590, the stipulation in the bill of lading issued to the shipper of a horse was to the effect that the liability of the carrier, in case of any injury to the horse, should not exceed one hundred dollars, nothing being expressly said about its value. The court held that the limitation was a mere stipulation against liability for negligence and was void. Similar stipulations were upheld upon the ground that they were named with reference to the value of the property at the time and [159] place of ship-

ment, in the following, among a large number of cases that might be cited: Zouch v. Chesapeake etc. Ry. Co., 36 W. Va. 524, 15 S. E. 185; Western R. R. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Squire v. New York Cent. R. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

It will be noted that all the cases cited are in perfect harmony with Abrams v. Milwaukee etc. R. R. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780, since the court there determined that the limitation of liability was fixed arbitrarily. In Moulton v. St. Paul etc. Ry. Co., 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497, the contract was in all essential particulars the same as the one in the Abrams case, and the result was the same. The key to the decision in that and all similar cases—except those in a few states which do not permit contracts limiting, directly or indirectly, the common-law liability of common carriers for negligence, and are out of harmony with the decision of the supreme court of the United States in Hart v. Pennsylvania Ry. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, of which Chicago etc. R. R. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417, where substantially the same form of contract we have before us was considered, is a fair example—is contained in the following language: "Upon the face of the contract under consideration it is apparent that it was not the purpose of the parties to liquidate the damages recoverable with reference to the value of the property consigned to the carrier." In a later case which has been cited (Alair v. Northern Pac. R. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072), the form of contract was substantially the same as the one before us, and it was said that the decision in Moulton v. St. Paul etc. R. R. Co., 31 Minn. 85, 41 Am. St. Rep. 55, 58 N. W. 780, had no bearing thereon except as it recognized the right of a common carrier and shipper to limit the liability of the former for damages through its negligence by a fair contract upon the basis of the value of the property; and it was held that, in the contract there under consideration, unlike the one in the Moulton case, the damages, in case of loss or injury to the property, were liquidated with reference to the value thereof as declared by the shipper or assented to by him, as in Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151.

160 Enough has been said to demonstrate that we would be flying in the face of the decisions of this and most courts were we to hold that the contract in question is a mere arbitrary stipu-

lation against liability for negligence; and at the same time we would be violating the plain words of the contract. The opening words of the bill of lading were, in substance, that the value of the horse did not exceed one hundred dollars. To that reference was thereafter made in the paper as a valuation of the property, and in one instance as a valuation agreed upon between the owner and shipper. In view of that, how can it be said that the limit of liability was arbitrarily fixed, no reference being had to the actual value of the property as in the Abrams case? It might be so said if, while language was used ostensibly fixing the value of the property, such value was so out of harmony with the ordinary value of similar property as to indicate that value, in fact, did not enter into the transaction. But that is not the situation here. As said by the court in Alair v. Northern Pac. R. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, apt language was used to make an agreement as to the value of the property, and the amount named is in harmony with common knowledge as to the value, ordinarily, of horses. So it would be doing violence to words to hold that the parties did not intend to do what their language indicates was their purpose. The contract seems to satisfy all the essentials of a valid agreement between shipper and common carrier, liquidating the maximum amount of damages recoverable by the former of the latter in case of loss or injury to the subject of carriage. The amount was fairly agreed upon, it was reasonable, and the charges for services and responsibility were based thereon. Such a contract has no similarity to the one construed in Abrams v. Milwaukee Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, Moulton v. St. Paul etc. R. R. Co., 31 Minn. 85, 41 Am. St. Rep. 55, 58 N. W. 780, and similar cases.

We have left to consider the question of whether the word [161] of limitation used in the contract, in regard to the class of injuries the parties had in mind in restricting recoverable damages, included injuries attributable to the carrier's negligence. The trial court decided in favor of respondent on that proposition. It will be noted that, following the language of the contract containing the shipper's declaration of the value of the horse, and in close connection therewith, are these words: "And it is agreed between the owner and shipper of these animals, and the said railway company, that in case of accident resulting in injury to said animals, the value thereof shall in no case exceed the values named above." In no place before those words

occur or thereafter is the word "negligence" used, or any word in itself indicating the precise meaning the parties ascribed to the word "accident" till we reach the conclusion of that part of the contract containing the carrier's receipt for the horse and statement of the rate for service to be rendered in respect to the property, when the following words occur: "In consideration of which, and further valuable considerations, it is hereby mutually agreed that said company shall not be liable for loss of livestock by jumping from cars, delay of trains not caused by negligence as aforesaid, or any damage said property may sustain except such as may result from a collision of the train with other trains, or when cars are thrown from the track in course of transportation," etc. Now, we have nothing to do with the last part of the language quoted, so far as it purports to exempt appellant altogether from injury or loss of the property while in its charge, from its negligence. We look in vain through what preceded the word "negligence" for anything that can reasonably be said to be the antecedent thereof other than the term "accident." By a very familiar rule for the construction of contracts, every word in the agreement must be taken to have been used for a purpose, and no word be rejected as mere surplusage if we can discover any reasonable purpose [162] thereof which can be gathered from the whole instrument. The words "negligence aforesaid" are strikingly significant. They must necessarily be taken to refer to some word or words that precede them, and it seems that, if they do not point to the word "accident" as their antecedent, they have none.

The learned circuit court reasoned thus: The carrier's common-law liability cannot be varied except by language unmistakably indicating that such was the intention of the parties; the contract is open to two constructions, hence it is the duty of the court to adopt the one most favorable to the shipper. We find no fault with those rules for construction, but the premises assumed in applying them to the case seem to be incorrect. Judicial construction of a contract does not reach a point where the meaning of some significant word can be said to be in doubt and it is permissible to assign thereto one of two meanings, either of which is within the reasonable scope thereof, upon merely arriving at a conclusion that such word may, as an abstract proposition, be given either of two meanings. A word in a contract, taken by itself, often admits of two meanings, when, from the whole contract to be construed, there is no reasonable doubt as to the sense in which the parties used

it. In that situation, the particular sense they ascribed to the word when the contract was made must be adopted if it is within the reasonable scope thereof. That satisfies the requisites of clearness in such a contract as the one before us, in order to vary the common-law liability of the carrier, and precludes the application of the rule that in case of doubt the uncertainty should be resolved against the carrier or the person responsible for the use of the uncertain term in the contract in respect to his own interests. If mere ambiguity of expression were always taken as justifying a court in choosing between two meanings of a particular word or collection of words, either of which is within the reasonable scope thereof, [163] the primary purpose of judicial construction—that of determining the intention of the parties in regard to the subject for construction, so far as the same can be located within the reasonable meaning of the language they chose to use—would often fail of accomplishment. There is often ambiguity of expression in a written contract or other writing when the meaning is plain, leaving no room for a selection to be made between two meanings for the purpose of arriving at the intention of the parties thereto. Words in their literal sense, if so applied, may lead to such an absurd result as to obscure the real meaning; and again, words in a contract, when taken in their literal sense, may be obscure in meaning, and such obscurity entirely disappear when a view is taken from the standpoint of the parties in reducing their agreement to writing. As an abstract proposition, it may be admitted that the meaning of the word "accident" is not always the same. However, if the reasonable scope thereof will admit of its standing as the antecedent of "negligence" in the contract before us, the meaning of the parties to the writing ascribed to it is too plain to be disregarded.

The trial court seems to have supposed that the word "accident" does not, properly speaking, or as commonly understood, refer to the result of negligence. In that he was clearly wrong. True, the word, in the narrow sense usually given thereto in connection with some qualifying word, does not refer to the result of actionable negligence, but it is commonly used without any qualifying word in speaking of such a result. There are, in this and other courts, many examples of such use. The numerous instances referred to by appellant's counsel might be largely added to: Oliver v. La Valle, 36 Wis. 592; Cummings v. National Furnace Co., 60 Wis. 603, 611, 18 N.

W. 742, 20 N. W. 665; Annas v. Milwaukee etc. Ry. Co., 67 Wis. 46, 59, 58 Am. Rep. 848, 30 N. W. 282; Koenig v. Arcadia, 75 Wis. 62, 43 N. W. 734; Groesbeck v. Chicago etc. Ry. Co., 93 Wis. 508, 509, 67 N. W. 1120; Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729; Buckmaster v. Chicago etc. Ry. Co., 108 Wis. 353, 84 N. W. 845. In the last case [164] cited this language was used: "If the accident be one which could happen only through decedent's negligence, then, of course, the accident itself establishes such negligence." In Groesbeck v. Chicago etc. Ry. Co., 93 Wis. 508, 67 N. W. 1120, this language was used, speaking of the opinion of the court in a previous case: "The accident in that case occurred at a place where there was no restriction on the speed of trains."

Further examples to almost any extent could be given showing that the result of negligence is commonly spoken of as an accidental occurrence, the term "mere accident" being commonly used where it is desired to repel the idea of negligence. In Sawyer v. Hannibal etc. R. R. Co., 37 Mo. 240, 262, 90 Am. Dec. 382, an instruction to a jury was held strictly accurate where the court spoke of "mere accident" as not actionable, putting the decision on the ground that the word "mere" differentiated a nonactionable from an actionable occurrence, the former being referred, for the proximate cause, to mere chance, and the latter to want of legal care on the part of a responsible person. In Henry v. Grand Ave. Ry. Co., 113 Mo. 525, 21 S. W. 214, the jury were instructed that if the injury to the plaintiff was purely accidental, he could not recover. It was contended on the part of the plaintiff that such language was misleading, because in the law of negligence the word "negligence" and the word "accident" are used synonymously. The court coincided with that view, yet held that the instruction was proper because of the qualifying word "purely"; that without such qualification "accident," referring to an occurrence caused by human agency, might suggest precedent negligence; and that the use of such qualifying word with the word "accident" is well understood to exclude negligence or carelessness. In McCarty v. New York etc. R. R. Co., 30 Pa. St. 247, the term "accident" was held applicable to an occurrence resulting from negligence, but that the use thereof, in speaking of an event causing damage to a person for which no one was liable, [165] was proper because of the following explanatory clause, "a circumstance over which they could have no control."

Thus it will be seen that while the term "accident," when ascribed to an injury to person or property rights, in a narrow sense, not only excludes human intention or expectation, but likewise duty, under the circumstances, in the exercise of ordinary care, to have anticipated the danger and guarded against it, yet it is treated in all the books as a proper designation of occurrences arising from actionable negligence. So common has its use in that way become that law writers have felt warranted in adopting, for a title to a treatise on law and practice in cases grounded on negligence, the words, "Law and Practice in Accident Cases": See Black's work on the subject. In Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205, in discussing this subject, the court said: "The poverty of language compels the use of words in different meanings, and this is notably true of the word 'accident.' Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men." In Browne on Judicial Interpretation, 4, 5, it is said that it will not do to construe the word "accident" as necessarily excluding negligence, for otherwise there could never be an accident where anyone is careless; and to that the author cites Schneider v. Provident etc. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, where this court held that "there is nothing in the definition of the word 'accident' which excludes negligence; that an accident may happen from an unknown cause, but it is not essential that the cause should be unknown; it may be an unusual result of a known cause and therefore unexpected to the party; that accidents often happen from such kinds of negligence."

It does not seem necessary to pursue this subject further to show that the trial court most grievously erred in holding that the terms "accident" and "mere accident" are [166] synonymous and both exclude human fault called "negligence." On the contrary, they are well-nigh universally treated in legal opinions as opposites, the former being referable, among other causes, to responsible human agency. It will not do to rely absolutely, for the meaning that may be reasonably ascribed to words, upon definitions thereof found in standard dictionaries. The use of words always precedes their recorded signification. When a particular use of a word becomes common, that use must be taken into consideration in construing a contract containing such word, regardless of whether the meaning can be found in any lexicon or not.

It follows from what has been said that "accident," as used in the bill of lading under consideration with reference to the occurrence for which liability of the carrier was limited to the stated value of the horse, may be said to include the result of negligence, and that the words "caused by negligence as aforesaid," in describing occurrences for which the appellant intended to recognize by express contract its liability, referred to the precedent words "in case of accident," and that such reference is so clear as to leave no room for the application of the rule which guided the trial court, that in case of doubt between two meanings of a word, either of which is within the reasonable scope thereof, the one should be adopted which sustains rather than the one which limits common-law rights.

There is another and perhaps still stronger reason than the one we have given for holding that the parties to the contract under consideration used the word "accident" in its broad sense. There were at least four ways in which the property of respondent was liable to be injured while in the possession of appellant, three of which, in the absence of a special contract, were included in the carrier's ordinary or extraordinary liability, which extended to the entire loss that might accrue to the shipper: 1. Acts of [167] God or the public enemies; 2. Willful misconduct of the carrier; 3. Negligence of the carrier; 4. Occurrences not referable to either of the causes mentioned, and which would be damnum absque injuria except for the special responsibility of common carriers as insurers. For injuries caused in the way first mentioned the law exempted appellant from all responsibility. For injuries caused in the second way, it was doubtful, at least, whether appellant could secure exemption by contract: Chicago etc. R. R. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417. For injuries caused in the third way it was within the power of appellant, by a fair agreement, to fix the measure of its liability on a value basis of the property. For injuries caused in the fourth way, appellant was free to obtain entire exemption of liability by contract, supporting the release of liability merely by a special freight rate: Schaller v. Chicago etc. Ry. Co., 97 Wis. 31, 71 N. W. 1042. It follows that if we were to hold that the word "accident," as used in the contract before us, means "mere accident"—occurrences falling within either the first or fourth way mentioned—we would convict the appellant of doing the absurd thing of stipulating for a limitation of responsibility where none existed at all, or for a limitation of liability to one hun-

dred dollars where entire exemption from liability could be, and in fact was, secured in consideration of a special freight rate, as indicated by language in the contract exempting appellant from all liability in certain cases in consideration of the tariff rate mentioned. The contract can only be made to appear reasonable and sensible, as it seems, by holding that the parties intended to confine the entire exemption from liability to those occurrences that were proper subjects for a contract to that effect, and to limit the liability, in the event of loss or injury to the property by negligence, in the only way protection in that regard could be secured, that is, by a fair contract on a value basis of the property. That the parties had in mind the class of liabilities which are [168] universally guarded against, so far as the law will permit it, by such a contract, seems clear. In this connection it is significant that in Chicago etc. Ry. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417, the form of contract contained the word "accident" as a designation of the occurrences which the clause limiting liability referred to, the same, substantially, as in this case; and it was treated without contention as including occurrences attributable to the carrier's negligence and as binding to that extent; but the plaintiff was held entitled to recover because the loss was caused by willful misfeasance of the carrier.

For the reasons given the judgment appealed from must be modified by reducing it to one hundred dollars, with legal interest from November 22, 1895, and costs as heretofore taxed, and affirmed as modified, costs in this court to go in favor of the appellant.

By the Court. So ordered.

Limiting the Liability of Carriers by their bills of lading is considered at length in the recent monographic note to Chicago etc. Ry. Co. v. Calumet Stock Farm, ante, pp. 77-133.

YERKES v. NORTHERN PACIFIC RAILWAY CO.

[112 Wis. 184, 88 N. W. 33.]

MASTER AND SERVANT—PROMISE TO REPAIR—ASSUMPTION OF RISKS.—If a servant has protested or objected to proceed with the work on account of the danger, and has a right to abandon the service because it is dangerous, but refrains from doing so because of assurances by the master that the danger shall be removed, such assurances remove all ground for holding that the servant, by continuing in the employment, engages to assume the risks. It is not essential that a direct threat be made by the servant to quit work, unless the repairs are made or the danger is removed, but only that he protest or object to proceed with the work on account of the danger, and that such objection is overcome by the promise to remove it. (pp. 962, 963.)

TRIAL—INSTRUCTIONS.—An erroneous instruction on a given subject is not cured by the fact that the law is correctly stated in another instruction. (pp. 964, 965.)

NEGLIGENCE, CONTRIBUTORY—DEFECTIVE APPLIANCES—PROMISE TO REPAIR.—A person is not guilty of contributory negligence in continuing to work, even temporarily, with a known defective appliance, after a promise to repair, if an ordinarily prudent person, under like circumstances, might reasonably believe and expect that by the exercise of some extra care and precaution he could avoid and avert the threatened peril. (p. 966.)

NEGLIGENCE.—ORDINARY OR DUE CARE is to be tested by the surrounding circumstances, and no definition is complete or correct which does not embody that element. Such care is the care ordinarily exercised by the great mass of mankind under the same or similar circumstances, and the omission of the last qualification in an instruction is error. (p. 966.)

NEGLIGENCE — PERSONAL INJURY — MEASURE OF DAMAGE.—A person who is injured through the negligence of another is entitled to recover damages for mental suffering and such impairment of physical abilities as he is reasonably certain to endure as the result of his injury. An instruction limiting his recovery to such suffering "as he will be compelled to undergo" and such damages "as he will actually sustain" is not prejudicial to the defendant. (p. 967.)

EVIDENCE.—A person receiving an injury caused by a defective appliance may testify that he continued in the employment in reliance upon a promise to repair, but not as to what he would have done had the promise not been made. (p. 968.)

L. Hanitch, C. W. Bunn, and L. T. Chamberlain for the appellant.

A. M. Warden, Daly & Barnard, and J. Lind, for the respondent.

187 DODGE, J. Two of appellant's contentions may well be considered together. The first is that there was no sufficient evidence of any protest or objection by the plaintiff against

continuing to work with the defective locomotive to carry the question to the jury, and therefore a verdict should have been directed in defendant's favor. The other contention is that the instruction given to the jury on this subject was erroneous. The conditions under which an employé may knowingly continue to work with a defective and dangerous appliance, in reliance upon a promise to repair, have been many times stated, and ought not to be in serious doubt. Judge Cooley (Cooley on Torts, 559) states the rule: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and [188] the master is not in the exercise of ordinary care unless and until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks."

In Stephenson v. Duncan, 73 Wis. 404, 407, 9 Am. St. Rep. 806, 41 N. W. 337, this court said: "Where the servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances by the master that the danger shall be removed, such assurances remove all ground for holding that the servant, by continuing in the employment, engages to assume the risk."

In Erdman v. Illinois Steel Co., 95 Wis. 6, 12, 60 Am. St. Rep. 66, 71, 69 N. W. 993, 995, in dealing with an alleged continuance at work in reliance on a promise to remove the danger, we said: "At the threshold of this question there is the essential element of protest or objection to proceed with the work on account of the danger." Other cases on the subject: Sweet v. Ohio Coal Co., 78 Wis. 127, 49 N. W. 182; Maitland v. Gilbert Paper Co., 97 Wis. 476, 484, 65 Am. St. Rep. 137, 72 N. W. 1124; Jensen v. Hudson Sawmill Co., 98 Wis. 73, 74 N. W. 434; Curran v. A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

From these cases it is apparent that the assumed willingness of an employé to continue work with the appliances supplied him, at his own risk, must be negatived, and it must be made apparent that the master or those representing him understand he is not so willing. Further, such unwillingness, brought to the knowledge of the master, may and must be overcome temporarily by a promise to remove the danger within a reasonable time. Appellant's counsel seems to contend in his

brief, though not so obviously in oral argument, that there must be a direct threat to quit work unless the repairs be made. This is not essential. Indeed, there may be cases where not even a spoken word from the employé is necessary, if it is apparent that the master or those representing him understand that a state of unwillingness and objection exists, and that such unwillingness is overcome by the promise of repair. The very manner [189] of making the promise may well indicate the understanding of the master that such unwillingness and mental protest does exist. That fact must appear, however, for it cannot be said that one refrains from abandoning service because of a promise, if it were not also true that but for that promise he would abandon it, and one cannot be said to continue in a perilous employment by reason of a promise if he were not otherwise unwilling so to do. Hence, the rule tersely suggested in the Erdman case is undoubted, that the master must be given to understand that the servant protests and objects against continued exposure to the danger. If, so understanding, he promises to remove it, the servant is justified in temporarily continuing the employment until such reasonable time has elapsed as to destroy his right to rely upon the promise to repair, except in certain cases of peculiarly great, imminent, and unavoidable danger, of which more hereinafter. The master meanwhile is responsible for such injuries as are proximately caused by the defect, without contributory negligence.

In this case the plaintiff first entered in a book a notification of the defect and need of repair, which book was an ordinary medium of communication between himself and his immediate superior. This act alone might, as counsel for appellant argues, be ambiguous. It might convey no intimation of plaintiff's unwillingness to expose himself to the peril of the defect, but merely an intention to perform a duty of notifying the master, in order that it might, for its own purposes, make repair. The further conversation between the plaintiff and the yard master, and also between the plaintiff and the yard master and the roundhouse foreman, is much more significant. It was addressed to the latter, to whom plaintiff had no right to give orders or directions. The roundhouse foreman remarked that the step in question was not very bad, to which Yerkes responded, evidently with considerable emphasis: "Well, it is bad enough, [190] and I want it fixed; I consider it unsafe." We think this language certainly capable of being

understood by those representatives of the master as expressing a state of protest and objection against further exposure to this dangerous condition. The words, "I want it fixed," "it is unsafe," could hardly be attributed to anything but such state of mind. Plaintiff had no right to express a command or direction to either of the others. They and he well understood that the only alternative within his control was to quit if his wish were not complied with. To express such wish was idle, unless some result were to follow refusal, but his manner and words were evidently inconsistent with mere futility. We think they might well convey to his hearers a purpose to act for his own protection if they would not. That they were so understood by the representatives of the master is clearly shown by the interview of the evening, when the engine was again brought out from the roundhouse. Plaintiff then said to the yard master, "There is that damn footboard now, and it hasn't been fixed." To this statement the yard master replied, "Use it to-night, Charley, and I will see that it is fixed to-morrow." These words would have been in no wise responsive to the plaintiff's remark, except as the latter was understood to convey the idea of protest against working with this device. We are satisfied that these conversations and declarations of the plaintiff were sufficient to carry to the jury the question whether he was protesting and objecting.

The instruction to which exception was taken was in the following words: "In other words, the general rule is that the servant assumes all ordinary risks of his employment, and if any defect in the tools, implements, or appliances is called to the attention of the employer, and the employer agrees to repair such defect, the employé may rely upon it, and continue his employment on the strength of the promise to repair, provided it is done within a reasonable time." [191] This instruction is clearly bad, in that it does not insist upon the element of protest and objection above discussed. It would be satisfied although the servant called the defect to the attention of his master under circumstances in no wise implying or indicating that he was unwilling to continue working with it in its then condition. In so far it was misleading, improper, and erroneous. True, in the same paragraph the court made another statement of the rule, in which he described the duty of the employé as to notify the employer of a special risk and object to continuing the work under the then existing conditions, but we cannot hold that thereby the vice in the portion ex-

cepted to was cured. The court attempted, apparently, to phrase the same rule twice. In so doing he expressed it once correctly, but again erroneously. It is well settled in this state that an erroneous instruction on a given subject is not cured by the fact that the law is correctly stated elsewhere; for it cannot be known whether the jury have been guided by the correct rule or by the erroneous one.

2. Appellant further contends that a verdict for the defendant should have been directed, and, one for plaintiff having been rendered, it should have been set aside, for the reason that the peril from the bent and slanting footboard was so obvious and imminent as to make serious injury so probable that plaintiff could not, consistently with reasonable care, expose himself to that peril, even temporarily and for a reasonable time, until the promise of repair was performed, resting mainly upon Erdman v. Illinois Steel Co., 95 Wis. 13, 60 Am. St. Rep. 66, 69 N. W. 993. That case stated a rule of law applicable to the liability of master to servants, well supported in reason, salutary and proper in a case falling within it, such as that presented on that occasion, where a mechanic, with full knowledge of the peril, placed himself in front of a saw revolving seventeen hundred times a minute, which he knew to be cracked, and attempted to saw bars of iron therewith. The continued [192] increase of the fissure in the saw was certain. It was obvious that the saw must very soon, and might at any moment, fly into fragments; that when it did so very serious injury to him was certain; and that no exertion or precaution on his part could protect him therefrom. That case, was followed by Maitland v. Gilbert Paper Co., 97 Wis. 485, 65 Am. St. Rep. 137, 72 N. W. 1124, wherein the opinion was written by Mr. Justice Marshall, and the case was distinguished from the Erdman case in the following words: "Here Welk was working under the immediate supervision of plaintiff. It is by no means conclusive that the circumstances were such that plaintiff may not reasonably have supposed that he could so supervise Welk's conduct as to temporarily avoid any serious danger of his presence as a coemployé."

The same distinction was pointed out in Curran v. A. H. Stange Co., 98 Wis. 606, 74 N. W. 377. See, also, Jensen v. Hudson Sawmill Co., 98 Wis. 73, 74 N. W. 434; Nelson v. Shaw, 102 Wis. 274, 278, 78 N. W. 417. From these authorities it results that it cannot be said as matter of law that one is so guilty of contributory negligence in continuing to work,

even temporarily, with a known defective appliance, after a promise of repair, if an ordinarily prudent person, under like circumstances, might reasonably believe and expect that by the exercise of some extra care and precaution he could avoid and avert the threatened peril. We think the facts in this case might well support such a conclusion by a jury. While it is undisputed that the step in question, ten inches in width, was bent down at one corner so that the outer edge was from two or three inches lower than the inner edge, yet the engine was provided with a handhold by means of which one could protect himself from falling. It had been used for at least two nights before this promise of repair, both by the plaintiff and by his helper, and no accident had occurred. Evidently, it was the opinion, both of his superior, the yard master, and of the roundhouse foreman, that it might be used without serious 193 and imminent peril, and that such use was not unreasonable. We cannot say that there was no evidence which, most favorably viewed, might support the inference drawn by the jury that the peril was not so imminent, so constant, and so unavoidable but that a reasonably prudent man might, without negligence, continue to use it pending the fulfillment of the promise to repair. That question was submitted under an instruction expressing the rule of the Erdman case with at least sufficient stringency against the plaintiff.

3. Plaintiff assigns as error the definition of the due care which plaintiff was bound to exercise to avert the charge of contributory negligence, viz.: "The plaintiff cannot recover in this case unless you find that he was in no manner guilty of any want of ordinary care, or such care as persons of ordinary care ordinarily use, which contributed to his said injuries."

That this was an incorrect and misleading definition of "ordinary care" has been declared so often by this court as to make further discussion unnecessary. The rule has been repeatedly laid down that due care is to be tested by the surrounding circumstances, and that no definition is complete or correct which does not embody that element. Ordinary care is the care ordinarily exercised by the great mass of mankind, or its type, the ordinarily prudent person, under the same or similar circumstances, and the omission of the last qualification, "under the same or similar circumstances," or "under like circumstances," is error: Boelter v. Ross Lumber Co., 103 Wis. 324, 330, 79 N. W. 243; Dehsoy v. Milwaukee Elec. Ry. etc. Co., 110 Wis. 412, 85 N. W. 973; Warden v. Miller, 112

Wis. 67, 87 N. W. 828. The necessity of the omitted qualification to a correct definition of due care is especially obvious under the circumstances of this case. What would be the care of an ordinarily prudent person, standing in safety upon a stationary platform, or even standing upon the perfect and level footboard of a [194] moving switch-engine, would not be the care to be expected of one attempting to perform the services of a yard man upon a bent, declining, and defective footboard such as here presented. The attention of the jury was not called by this instruction to a very important element which they must consider in order to decide whether the plaintiff was or was not guilty of contributory negligence, and the instruction to them on the subject was therefore misleading and erroneous.

Since, by reason of the two errors already pointed out, this cause must be reversed and remanded for a new trial, it is perhaps not necessary to discuss fully some of the other assignments of error. It may be well, however, to notice the instructions with reference to damages for future suffering and impairment of ability. The court instructed that, in case the jury found the injuries to be of a permanent character, they should assess "such damages for physical and mental suffering as he will be compelled to undergo in the future, and for future loss of time, but can only assess such damages as you find from the evidence the plaintiff has actually sustained and will actually sustain if his injuries are permanent." That there was evidence to justify the jury in finding permanent injury and future suffering we have no doubt. The loss of a limb, of course, impairs one's efficiency, comfort, and enjoyment of life, and in this case there was evidence of a stubborn resistance to complete healing of the wound resulting from amputation. The elements in the instruction which are criticised are the two expressions, "as he will be compelled to undergo," and "will actually sustain." We cannot discover in these anything injurious to the defendant, for they seem to require a higher degree of certainty of such injury than is justified by the law. The rule has been many times stated that a plaintiff is entitled to recover damages for such suffering and such impairment of abilities as he is reasonably certain to endure as [195] the result of his injuries. This measure of certainty should be required of a jury, and not a different one, which may or may not be its equivalent.

Error is also assigned upon the overruling of objections to certain questions to witnesses. The court, over defendant's objection, asked the question of the plaintiff: "How did it happen that you remained there and used that engine after—worked on that engine—after you noticed the condition it was in? A. I stayed there and worked because they had promised to fix it." The plaintiff was then asked by his counsel, "Would you have worked on that engine after you discovered the condition it was in there, if they had not promised to repair it?" to which, after objection, he answered, "I would not." These questions were objected to because they called for the conclusion of the witness. The first of them is unobjectionable. It is but testimony of the plaintiff to his mental processes. It differs not at all from the question usually propounded in actions of deceit, whether or not the defrauded party believed and relied on the fraudulent statement, and whether he was induced to act thereby; and while such evidence is, at best, of but little weight, as said in Erdman v. Illinois Steel Co., 95 Wis. 12, 60 Am. St. Rep. 66, 69 N. W. 993, it is admissible: Curran v. A. H. Stange Co., 98 Wis. 606, 74 N. W. 377; Great Northern R. R. Co. v. McLaughlin, 70 Fed. 669, 17 C. C. A. 330, 333. The second question, whether plaintiff would have worked on the engine but for the promise, is objectionable in form. So far as it goes only to the proposition that he relied on the promise and was induced thereby to work, it is in parity with that asked by the court; but in form it calls for the opinion of a witness as to what his conduct would have been in a hypothetical case—a form of question which has been held improper very often: Woodworth v. Mills, 61 Wis. 44, 54, 50 Am. Rep. 135, 20 N. W. 728; Commercial Bank v. Firemen's Ins. Co., 87 Wis. 297, 303, 58 N. W. 391; Hill v. American Surety Co., 107 Wis. 19, 29, 81 N. W. 1024, 82 N. W. 691.

The last assignment of error, predicated upon alleged excessive [196] award of damages, cannot be sustained, in the light of Berg v. Chicago etc. P. Ry. Co., 50 Wis. 419, 7 N. W. 347. In that case the permanent injury was quite similar to plaintiff's, but the earning capacity of Berg was less than one-third of Yerkes'. The recovery in this case would purchase for the plaintiff an annuity of but little more than half of his yearly earnings at the time of his disablement. While the damages are large, we cannot say that they are beyond reason, or necessitate an inference of passion or prejudice.

The two errors in charging the jury above indicated render reversal unavoidable.

By the Court. Judgment reversed, and cause remanded for a new trial.

Master and Servant.—It is a general rule that a protest by an employé against continuing in the employment because of some special risk attending it, such as defective or dangerous machinery, a promise by his employer to remove the danger within a reasonable time, and a continuance of the employment in consideration of such promise, will relieve employé from the charge of contributory negligence if he is injured because of the danger within such time. But, if the servant continues in his employment after the lapse of that time, or if his conduct amounts to recklessness, he assumes the risk of injury: Illinois Steel Co. v. Mann, 170 Ill. 200, 62 Am. St. Rep. 370, 48 N. E. 417; Maitland v. Gilbert Paper Co., 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; Erdman v. Illinois Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66, and cases cited in the cross-reference note thereto, 69 N. W. 993; monographic notes to Gulf etc. Ry. Co. v. Brentford, 23 Am. St. Rep. 886; Buzzell v. Laconia Mfg. Co., 77 Am. Dec. 224.

McGILLIVRAY v. JOINT SCHOOL DISTRICT.

[112 Wis. 354, 88 N. W. 310.]

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—QUANTUM MERUIT.—If a contract for the purchase of material for a schoolhouse increases the indebtedness of the school district beyond the constitutional limit it is void; and the fact that the district has had the benefit of such material does not render it liable on an implied contract to pay quantum meruit therefor. (pp. 970, 971.)

MUNICIPAL CORPORATIONS—NOTICE OF LIMITS OF POWER.—One who deals with the officers of a public corporation must take notice of the limits placed by law upon the powers of those agents of the taxpayers, and if he becomes an innocent party to an attempt to impose upon them forbidden burdens, he must necessarily fail. (p. 971.)

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—VALIDITY OF CONTRACT.—A contract made by a municipal corporation by which it incurs an indebtedness in excess of the constitutional limit is, after it is performed, valid and enforceable up to the constitutional limit, but invalid as to the excess, whether it is severable or not. (p. 976.)

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—FORBIDDEN CONTRACTS—RATIFICATION.—A contract for the building of a schoolhouse, by which the school district incurs an indebtedness in excess of the constitutional limit, is ratified and validated up to such limit by a vote of the district to borrow and raise funds by taxation for the erection of the schoolhouse sufficient to cover the obligation incurred. (p. 978.)

Action on a contract to furnish all the millwork for a schoolhouse for the sum of eight hundred and fifty dollars. Judgment for defendant and plaintiff appealed.

Pope & Pope, for the appellant.

G. M. Perry, for the respondent.

[356] DODGE, J. The validity of plaintiff's contract is assailed on the ground, among others, that it carried the indebtedness beyond the constitutional limit of five per cent of the assessed valuation, and was therefore beyond the power of the district itself. That such was the fact is beyond dispute. Five per cent of the assessed value was $3,578.20; the existing indebtedness on February 19, 1900, was $2,983.76; the constitutional limit of indebtedness was, therefore, $594.44—less than $850. The contract was, therefore, forbidden by section 3, article 11, of the constitution. Appellant, however, contends that, even though the express contract to pay for the "millwork" furnished and performed by him be void, yet, as he has alleged and proved that the district [357] has had the benefit, it must be held liable as upon an implied contract. Obviously, if that position is to be sustained in all such cases, the constitutional prohibition that "no school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein" is ineffectual to protect the inhabitants and taxpayers against the unlawful acts of their agents, either the electors in school district assembled, or the school board, or even the individual officers. If, whenever those agents are able to cause lumber to be wrought into a schoolhouse, or work to be done thereon, the district must be held to pay therefor, however unlawful or forbidden, the result prohibited by the constitution is accomplished, for the district becomes indebted. Nevertheless, the doctrine is not without support from remarks made in opinions of courts and from text-writers, though it is believed that all well-considered decisions stop short of holding that a municipal corporation may be held liable on implied contract to pay quantum meruit for property which it had no power or was forbidden to purchase. We by no means question the rule that a municipal corporation may be held on principles of equity to return that which it has obtained and holds by means of a contract which it had no authority to make, whether the thing obtained be money or property. That rule has

recently been enforced in the thoroughly considered case of Thomson v. Elton, 109 Wis. 589, 85 N. W. 425, where the other Wisconsin decisions supporting it are cited, together with some from other jurisdictions, to which might be added the very illustrative case of Chapman v. Douglas Co., 107 U. S. 348, 2 Sup. Ct. Rep. 62. There the corporation, having power to purchase land for a courthouse, did so by a contract void because the manner of payment was forbidden. The court rendered judgment requiring, in the alternative, reconveyance of the property or [358] payment of the purchase price. Another illustrative case is Stebbins v. Perry Co., 167 Ill. 567, 47 N. E. 1048, where, after railroad aid bonds had been found unauthorized and void, and all recovery thereon denied, the right of the plaintiff was sustained to reclaim the capital stock held by the county as consideration thereof.

These cases all proceed upon the theory of rescinding a void contract and undoing the acts done in reliance thereon, so as to place the parties in the original status quo. None of them holds that a municipal corporation can become liable for a debt by implied contract in defiance of a direct statutory or constitutional prohibition against its becoming liable at all. Indeed, such prohibition is expressly mentioned in Thomson v. Elton, 109 Wis. 589, 85 N. W. 425, as an insuperable obstacle to recovery. Other cases marking the distinction and enforcing such a prohibition might be cited almost without limit. A few will suffice: Richardson v. Grant Co., 27 Fed. 495; Gamewell Fire Alarm Tel. Co. v. Laporte, 102 Fed. 417, 419; Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. Rep. 820; Mosher v. Independent School Dist., 44 Iowa, 122, 126; Capital Bank v. School Dist. No. 53, 1 N. Dak. 479, 48 N. W. 363; McDonald v. Mayor etc. of New York, 68 N. Y. 23, 23 Am. Rep. 144; Fox v. New Orleans, 12 La. Ann. 154, 68 Am. Dec. 766; Joint School Dist. v. Reid, 82 Wis. 96, 51 N. W. 1089; Earles v. Wells, 94 Wis. 285, 59 Am. St. Rep. 885, 68 N. W. 964.

In the instant case, we find the direct and positive prohibition against incurring the liability for the property and labor furnished by appellant, and that prohibition cannot be evaded by the legerdemain of substituting the fiction of an implied contract on which the prohibited liability may rest, instead of the void express contract. He who deals with the officers of public corporations must take notice of the limits placed by law upon the powers of those agents of the taxpayers. If he

becomes a party, however innocently, to an attempt to impose on the latter forbidden burdens he must expect to fail.

A much graver question, hardly suggested and not at all [359] argued in appellant's brief, forces itself upon our consideration. That is whether the district, having the power to incur liability to the extent of $594.44, may not be held to have done so by a promise to pay a larger amount, when, as here, the contract of the other party has been fully executed, and the district has obtained something that it had authority to purchase. That exact question is new in Wisconsin, and not controlled by direct authority though the principles on which it may be resolved are pretty well established.

No rule is better settled than that, in the revision of governmental acts claimed to exceed the limits imposed upon such governing bodies by the fundamental laws under which they exist, the courts will uniformly strive to give effect to such acts so far as is possible without disobeying the restrictions so imposed, and will hold acts valid up to such limits, notwithstanding some excess beyond constitutional restrictions, if the latter can be separated and can be denied efficacy without defeating the clear and obvious purpose of the whole act: McCullough v. Virginia, 172 U. S. 102, 19 Sup. Ct. Rep. 134; Detroit v. Detroit City Ry. Co., 60 Fed. 161; Illinois Trust etc. Savings Bank v. Arkansas City, 76 Fed. 271; Kimball v. Cedar Rapids, 100 Fed. 802; Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8320; Johnson v. Stark Co., 24 Ill. 75; Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330; Briscoe v. Allison, 43 Ill. 291; State v. Allen, 43 Ill. 456; Scofield v. Council Bluffs, 68 Iowa, 695, 28 N. W. 20; Thompson v. Independent School Dist., 102 Iowa, 94, 70 N. W. 1093; Lynch v. The Steamer Economy, 27 Wis. 69; Chicago etc. Ry. Co. v. Langlade Co., 56 Wis. 614, 14 N. W. 844; Monroe Water Works Co. v. Monroe, 110 Wis. 11, 18, 85 N. W. 685; State ex rel. Hicks v. Stevens, 112 Wis. 170, 88 N. W. 48; Allen v. La Fayette, 89 Ala. 641, 8 South. 30. Among these will be found cases holding that an act of the legislature providing that certain coupons shall be receivable for all state taxes is valid as to all taxes except such as the constitution required shall be paid in money; that tax levies including illegal amounts may be valid for [360] legal parts, and abated by striking out the illegal; that ordinances granting exclusive franchises in streets are valid as franchises, though invalid as to the exclusiveness; that bonds bearing a higher rate of interest than permitted by the law

authorizing them may be enforced at the highest rate of interest permitted by the law, and held invalid merely as to the excess; and that contracts invalid as to method of payment may be held valid to require payment in such manner as the corporation might legally have promised. Under this general rule it has been held that acts of municipal or public corporations in incurring indebtedness, or in issuing bonds in excess of a limit prescribed by the constitution or by law, might be given effect up to the limit so prescribed, in a multitude of cases, presenting various phases and illustrations: McPherson v. Foster Bros., 43 Iowa, 48, 22 Am. Rep. 215; Stockdale v. School Dist. No. 2, 47 Mich. 226, 10 N. W. 349; Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781; Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982; Keith v. City of Du Quoin, 89 Ill. App. 36; May v. Gloucester, 174 Mass. 583, 55 N. E. 465; School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81; Citizens' Bank v. Terrell, 78 Tex. 450, 460, 14 S. W. 1003; Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. Ct. Rep. 397; Francis v. Howard Co., 50 Fed. 44; Aetna etc. Ins. Co. v. Lyon Co., 82 Fed. 929, 934; Crogster v. Bayfield Co., 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; Herman v. Oconto, 110 Wis. 660, 86 N. W. 681.

In McPherson v. Foster Brothers, 43 Iowa, 48, 22 Am. Rep. 215, which is now certainly entitled to be considered a leading case, two propositions were decided. A contract of $15,000 having been made when the constitutional limit of indebtedness which might be incurred was $2,057.50, and that contract having been executed by the contractor, it was held that the promise of the school district to pay was valid and enforceable up to the constitutional limit, but invalid as to the excess. In that case, bonds of the district for the full $15,000 had been issued and were in circulation, and it was further held that $2,057.50 of the $15,000 bonds was valid, and that the 661 court could protect the equities by scaling down each bond pro rata.

In Stockdale v. School Dist. No. 2, 47 Mich. 226, 10 N. W. 349, the opinion being by Cooley, J., the first proposition of the Iowa case was fully concurred in. There a contract to build a school-house having been fully performed, to the loss of the contractor, the district voted to pay him in settlement $730, and issue bonds therefor, when the constitutional debt limit was but $300. The action was to enjoin the issue of bonds. The court held the promise to pay $730 valid to the extent

of $300, and void as to the excess, and enjoined the issue of bonds in excess of $300.

In Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781, was a fully executed contract to build waterworks for $11,619, made at a time when the constitutional limit permitted indebtedness of only $10,453. The court held the promise of the city binding to the extent of the $10,453, its debt limit, and enjoined further payment and the collection of so much of a tax levied therefor.

Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982, has no resemblance in its facts, but both principles laid down in the Iowa case were expressly approved, and in that case it was declared, obiter, that even an executory contract, if divisible, would be restrained only for its excess above the constitutional debt limit—a doctrine not necessary to be considered in the instant case.

Keith v. City of Du Quoin, 89 Ill. App. 36, dealt with a contract executed by the contractor to build waterworks at a gross price of $13,486, made when the city's debt limit permitted only $3,500. Held, that the city's promise to pay was valid up to that limit, though void and unenforceable as to the balance.

May v. Gloucester, 174 Mass. 583, 55 N. E. 465, presented a contract, indefinite in time, to pay $3 per day for hire of horses, under which some $400 had been earned. The officers making the contract [862] were limited by law to contracts not exceeding $100. Their contract to pay was held valid and binding upon the city to the extent of the $100, and invalid as to the balance.

In School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81, an entire contract for the building of a schoolhouse for $16,896.60 was made, when the debt limit was $8,000. The court held the contract valid and binding on both parties, though executed only in part, and decided that the contractor was liable in damages for failure to complete, and that the town was liable upon its promise to pay up to the amount it could legally promise, to wit, $8,000. This decision was made in an action at law, and was accompanied by an intimation that a court in equity might relieve the contractor by the method of rescission for mistake.

In Citizens' Bank v. Terrell, 78 Tex. 450, 14 S. W. 1003, as to issue of bonds for waterworks in excess of constitutional limit, the court held that an amount up to that limit represented valid indebtedness; that, if evidence showed the bonds to have been issued at different times, the earlier issues should be en-

forced, each for its full face, but, if issued all at once, each bond should be valid for a proportionate part of the whole permitted debt.

In Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. Ct. Rep. 897, bonds were issued and put in circulation to the amount of $320,000, when only $250,000 were within the power of the county officers. The court held that the county should be liable to the amount authorized, namely, $250,000, but not liable for the balance, and remitted the case to take evidence as to how severance should be made, indicating that if the bonds were not issued all at once, those first issued would be valid up to the amount specified.

In Francis v. Howard Co., 50 Fed. 44, bonds were issued all at once to the amount of $35,000, in face of a constitutional limit of $13,982.77. The court applied the rule of McPherson v. Foster Brothers, 43 Iowa, 48, 22 Am. Rep. 215, holding the county liable for the [363] permitted amount, and not liable for the balance, and scaled down each bond and coupon pro rata.

In Aetna etc. Ins. Co. v. Lyon Co., 82 Fed. 929, the plaintiff was the original payee and holder at the time of suit of an entire issue of $120,000 of refunding bonds issued at a time when the constitutional debt limit had already been reached. The court held it competent for the county to issue new bonds to pay old debts, as the indebtedness was not thereby increased, but that the new bonds would not be valid except so far as the proceeds of them had been actually applied to the old indebtedness, and would be valid to that extent. The cause was remanded for evidence as to what part of the $120,000 had been so used, with directions to cancel all excesses of bonds above that amount.

Crogster v. Bayfield Co., 99 Wis. 1, 74 N. W. 635, 77 N. W. 167, was a suit in equity to cancel the entire issue of $240,000 of railroad aid bonds, the county debt limit being approximately $225,000. It appeared that under the contract each section of the road was to be compensated by a specified quantity of bonds, the last section to justify issue of $25,000. The court held that, so far as the contract was severable, it was binding, and that all of the bonds except the last $25,000 should be held valid and binding obligations. Those, although they only exceed the debt limit by $15,000, were held all invalid, for the reason that the contract which they were to compensate, namely, the single section of the road, was entire, and the bonds were all issued at once, so that none of them could have priority over

others. The court, while enforcing the general principle of liability up to the limit of power upon acts exceeding it, repudiated the doctrine of McPherson v. Foster Brothers, 43 Iowa, 48, 22 Am. Rep. 215, and other cases following it, that a total and simultaneous issue of bonds could, with practical safety, be scaled down to some other figure, therein resting upon the authority of Hedges v. Dixon Co., 150 U. S. 182, 14 Sup. Ct. Rep. 71. While the reasons for this repudiation were not very fully set forth, of [364] course many such suggest themselves, prominent among which is the inability to ascertain and bring before the court all of the parties having rights in such bonds, or to prevent others from acquiring rights, so that the priorities and equities between them can be controlled—a very practical objection to the course which was taken by the Iowa court where owners might have so dealt that as among themselves some ought to be paid in full before others received any payment.

The last case on the subject is Herman v. Oconto, 110 Wis. 660, 86 N. W. 681, where this court held that a promise to pay by a city upon a sewer contract exceeding the debt limit would be held valid up to that limit, provided the duty of the contractor was of such character as to be capable of severance. It was not necessary in that case to discuss, and the court did not discuss, whether the same holding might not have been made if the contractor's obligation had been entire.

Thus we find that the principle of liability of municipal corporations with limited powers up to the limit of those powers, even upon an act or contract some part of which is in excess thereof, is well supported by authority from a multitude of courts, and impliedly at least by this court. The only difficulty which courts have at any time deemed at all serious was whether a severance could be made at the dividing line between that which was legal and that which was forbidden, and there is grave discussion in several of the cases whether the duty assumed by the contractor was capable of severance. But is this necessary or at all material to the equitable purpose which has induced the adoption of the general principle above stated? It seems to us not, in cases like this, where the contractor has fully performed his entire contract, regardless of whether there was a line of severance in the course thereof, and where the only obligation of the municipality is the mere payment of money. Such an obligation is in its nature severable, as one dollar is severable [365]

from another. As that is the only obligation questioned or sought to be enforced, why is not its severability sufficient without inquiring whether the contractor's duty was also capable of division? After the latter's duty has been fully performed, and he finds he can receive but a part of the agreed price, it matters not at all to him or anyone else to what part of his services the money paid shall be ascribed. It is in practical effect a payment of a less price for the entire work. If a school district has power to purchase and pay for a schoolhouse costing $10,000, and obtains one worth $12,000, and for which it promised to pay $12,000, although upon indivisible contract, there is no constitutional prohibition breached except by promising to pay the excessive $2,000. It is too late, after the completion of the building, for the contractor to rescind, and no other form of remedy is open to him except to receive what the municipality can pay. It would certainly seem the part of equity rather that the school district should pay the $10,000 which it had a right to promise to pay for a schoolhouse than that the contractor should suffer the entire loss of his services—a result to be avoided if possible without disobedience of the constitutional restriction. Obviously, if he had offered to build the identical schoolhouse for the $10,000, and the city had promised to pay it, no criticism could have been made of the transaction. It seems absurd to say that the city cannot pay the permitted $10,000 because, forsooth, the schoolhouse was better and more valuable than it could ordinarily purchase for that price. In the case before us, if the plaintiff had offered to supply the millwork according to the specifications for $594.44, and the district had legally promised to pay him that sum therefor, the transaction would have been within its competency, and would have infringed neither word nor spirit of the constitution; and yet that is the result of now holding the district liable for that sum. They have purchased that which they had the right and the power to purchase [366] in their discretion. They have not infringed the constitution, because they have not imposed liability in excess of the five per cent limit prescribed by the constitution. In this connection it should be noted that the constitutional provision is not against making contracts nor against purchasing material or labor, but against incurring indebtedness, and, if we hold a promise to pay a larger sum valid only up to the debt limit, the result is that such promise does not incur indebtedness beyond that amount: Joint School Dist.

v. Reid, 82 Wis. 96, 51 N. W. 1089. We are convinced that no principle of law nor rule of statutory construction stands in the way of doing this measure of justice to a contractor who innocently and in good faith supplies a municipal corporation with the things it has the right to purchase. The defendant had power to promise to pay $594.44. If it has promised in legal form to pay a larger sum, and has received the full consideration therefor, which it cannot now return, it should be held to its promise up to the lesser sum.

But it is argued by the respondent that, even conceding the power of the superior agent of the school district, namely, the meeting of the electors, to make a valid contract, yet no such contract had been made, because the subagency, the school board, with whom plaintiff's transaction was had, did not have authority to make it, for the reason that the board is by section 434 of the Statutes of 1898, limited, in building schoolhouses, to "funds provided for that purpose," and that, at the time of making the contract, the only funds provided were the $2,580 borrowed from the state, which had been more than exhausted. This objection would seem to be insuperable to the original validity of the contract made by the school board to pay either the sum of $850 or the sum of $594.44: Capital Bank v. School Dist. No. 53, 1 N. Dak. 479, 48 N. W. 363; Nevil v. Clifford, 63 Wis. 435, 443, 24 N. W. 165. It is, however, too thoroughly settled to need more than statement that what the district meeting could in advance [367] authorize it can subsequently ratify: Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; Kane v. School Dist., 52 Wis. 502, 9 N. W. 459; Nevil v. Clifford, 63 Wis. 435, 24 N. W. 65; Koch v. Milwaukee, 89 Wis. 220, 228, 62 N. W. 918. Of course, this power of ratification is subject to exactly the same limitations as the power to authorize in advance; but within those limitations it is complete. We are unable to avoid the conviction that the record in this case discloses such ratification of the contract made with the plaintiff; for, five months after it was made and with presumptively full notice thereof, and having in view their original resolution for a $4,000 schoolhouse, the district meeting in July did all in its power to provide funds therefor by authorizing the board to borrow, for the erection of said schoolhouse, the further sum of $1,000, and by voting to levy a tax of $1,600 therefor. True, the latter vote has been held illegal and void. Whether that holding in a suit to which the plaintiff was not a party is of force, we need not decide, for the other

vote, authorizing the borrowing of money, is certainly sufficient, under the circumstances, to ratify this contract and the incurring of the obligation to pay to the plaintiff $594.44, which, with all prior obligations, would be covered by the additional funds thus to be provided. Of course, neither of these votes can validate the contract beyond this amount, for, at the time it was made, that was the limit which the district meeting could have authorized.

Upon the whole case, therefore, we conclude that plaintiff was entitled to recover judgment for the last-mentioned sum, and that the judgment rendered was erroneous. Nothing appears in the record to justify recovery of interest prior to commencement of the action.

By the Court. Judgment reversed, and cause remanded with directions to render judgment for the plaintiff for $594.44, with interest from November 22, 1900.

Municipal Indebtedness beyond the constitutional and statutory limits is considered in the monographic note to Beard v. Hopkinsville, 44 Am. St. Rep. 229-243. A contract in excess of such indebtedness is not enforceable: Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681; State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99; State v. Pullman, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265; Keller v. Scranton, 200 Pa. St. 130, 86 Am. St. Rep. 708, 49 Atl. 781. And persons becoming creditors of a municipal corporation must ascertain at their peril whether the credit they extend will carry the indebtedness beyond the limit prescribed: State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 458, and cases cited in the cross-reference note thereto, 63 Pac. 99.

RAESSER v. NATIONAL EXCHANGE BANK.

[112 Wis. 591, 88 N. W. 618.]

BANKS AND BANKING—CHECK AS ASSIGNMENT OF DEPOSIT.—A check given for value on an ordinary bank deposit is an assignment of the fund pro tanto, as between the maker and the payee. (p. 980.)

ASSIGNMENT OF PORTION OF FUND.—By an assignment of a portion of a fund in the hands of a depositary, the assignor parts with the ownership of such portion, and as between himself and the assignee the transfer is complete, whether the depositary consents to the assignment or not. (p. 983.)

ASSIGNMENT OF PORTION OF FUND—CONSENT OF DEPOSITARY.—If the depositary of a fund consents to the assignment of a portion thereof, he thereby merely confers upon the assignee a remedy to obtain from him that which is already his by the assignment. (p. 983.)

ASSIGNMENT OF PORTION OF FUND—EFFECT OF PAYMENT.—By payment to an assignee of a portion of a fund in the hands of a depositary, the latter discharges pro tanto all obligation, and the assignor has no rights against him in respect thereto. (p. 983.)

ASSIGNMENT OF PORTION OF FUND—RIGHTS OF PERSONAL REPRESENTATIVE.—The personal representative of a deceased depositor who has assigned a portion of the fund stands in no better position with reference to such fund than the original depositor. (p. 984.)

BANKS AND BANKING—CHECK AS ASSIGNMENT OF FUND—REVOCATION.—A bank check for a valuable consideration constitutes an assignment of that portion of the deposit covered thereby, and not only authorizes the bank to pay, but also evidences a contract between the maker and payee, not revocable except for good cause, and if the bank pays after notice of revocation, its only peril is ability to show a valid and irrevocable contract of assignment. (p. 985.)

BANKS AND BANKING—CHECKS—DEATH AS REVOCATION.—The death of the maker of a check is no more efficacious as a revocation of authority to pay, than a revocation by the act of the maker living. (p. 985.)

ASSIGNMENT OF PORTION OF FUND—RIGHTS OF DEPOSITARY.—The right of a depositary of a fund to refuse consent to a partial assignment thereof is absolute and cannot be controlled, and the assignee cannot, by any process of notice or demand, impose on the nonconsenting depositary any duty to protect his equitable rights. (p. 985.)

Sylvester, Scheiber & Orth, for the appellant.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondent.

593 DODGE, J. This case, as argued by counsel, presents several interesting questions as to the relations resulting from the giving of a check for value on an ordinary bank deposit, if, as is now fully settled in Wisconsin, the giving of such check will be construed to intend an assignment of the fund pro tanto as between the maker and payee: Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847. The principles and reasons lying at the foundation of the rules of law fixing the rights of an assignee of a fund in the hands of an ordinary debtor or depositary 594 are discussed at some length in Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426, sufficiently, at least, so that only the differences between such depositary and the modern bank of deposit need be considered in applying such rules to the latter. The propositions decided in the Skobis case were that the modern statutes authorizing suits to be brought by the true party in interest had removed all difficulties in the way of assignments of indebtedness, so that any act

which, in the intention of the parties, as between assignor and assignee, constituted a transfer of an indebtedness or of a fund, gives a complete ownership and right of action therefor to the assignee, legal because enforceable by an action at law; that this principle is limited by the further consideration that a debtor or depositary owing one debt and subject to only one action therefor cannot, without his consent, be subjected to the splitting up of that indebtedness so as to be liable to several actions. Hence that an assignment of a part of a fund, while effective as between the assignor and assignee, cannot be enforced by direct suit at law against the depositary without his consent. It can only be enforced by bringing into court the depositary and all claimants against the fund in one suit, where their various rights can be adjudicated. That form of action being cognizable only by a court of equity, it is said that the assignment is equitable only; not that it is less complete as between the parties, but merely not enforceable in a direct action at law against the depositary. This objection to its enforceability is one which the depositary can waive, as it is purely for his convenience and benefit; and he can waive it either in advance of the assignment or afterward, when demand is made upon him in or out of court, though he is under no legal or equitable obligation so to do. It will be observed that these limitations on the enforcement of the rights conferred by an assignment are based upon the dominant consideration of protecting completely the rights of the third party depositary not participating in the assignment.

595 Such being the law ordinarily, of course, it should apply equally when a bank is a depositary, except so far as the relation between the bank and its depositors is such as to make the same reasons support different conclusions. The doctrine of Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847, is based upon one of those distinctions. It has been held from early times with almost unanimity that a bill of exchange drawn by one man upon another, not in any wise designating a specific fund out of which it is to be paid, works no assignment of a fund or portion of a fund which may chance to be in the hands of the drawee. This is based upon the fact, well recognized by the law-merchant, that bills of exchange are not always—perhaps are not generally—drawn against funds. The ancient bill of exchange was a mere convenience for enabling a creditor of the drawer to receive his payment at some other place than the latter's residence, and it was drawn on cor-

respondents who knew of the credit and responsibility of the drawer and were willing to pay money at his request, and look to him for reimbursement, either by remittance or by reciprocal honor to their own bills of exchange. In modern times, at least, the check upon a banker has attained a different significance. The banker is not customarily or often in the habit of honoring checks except as they are drawn against a fund first placed in his hands for that purpose. This fact has been recognized in the rule, now well established, that it is a fraud to draw a check upon a bank where the drawer has no funds, and by the statutes, now quite general, making such an act criminal under certain circumstances. From this difference results the presumption, recognized and enforced in Pease v. Landauer, 63 Wis. 20, 33 Am. Rep. 247, 22 N. W. 847, that one who draws a check upon a bank impliedly asserts that he has a fund in the hands of that bank out of which it is expected to be paid, and therefore that he assigns so much of that fund as the check calls for; just as if, between private individuals, the document declared on its face [596] the existence of a fund in the hands of a drawee and ordered the bill of exchange paid therefrom.

The further question is interesting, and not yet decided, in Wisconsin at least, whether, from the very purpose of a deposit to be drawn against by checks to different parties, there does not arise an understanding and agreement, in advance, by the bank to pay such deposit, not necessarily in solido as between ordinary debtor and creditor, but in such sums and to such people as the depositor may, by his checks, direct. If such an agreement is to be implied from the ordinary course of business, there would seem forceful logic for the conclusion that the assignment resulting from the giving of a check for value, complete and valid as between the maker and payee, should be enforceable in a suit at law against the bank. It must be conceded that the overwhelming weight of authority is to the negative of this conclusion, and yet the greater part of that authority is from jurisdictions which do not recognize the rule of Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847, and give to a check no efficacy whatever as an assignment, but recognize it merely as an authority from the bailor to his bailee. The question thus suggested is reserved in Pease v. Landauer in Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426, and in Dillman v. Carlin, 105 Wis. 14, 17, 76 Am. St. Rep. 902, 80 N. W. 932, and, but for certain statutory provisions recently enacted in Wisconsin, would be worthy of grave

consideration, and perhaps decision, in the present case. But, inasmuch as by the new negotiable instruments law (Laws 1899, c. 356, secs. 1684, 1685) it is provided that the bank shall not be liable to the holder of a check unless and until it accepts or certifies it, the question of such liability, independently of the statute, is no longer a general or important one, and, unless essential to the decision of the instant case, should not further occupy our time, although the present checks, having been given in 1897, are not controlled by that statute.

Independently, then, of the question whether the holder
597 of a check for value can sue the bank thereon at law without its consent, what are his rights against that fund as between him and the maker, or one claiming in the right of the latter as a volunteer and not for value, when the depositary, who still has the fund, consents to its splitting up and to the assignment accomplished by the giving of the check? Of course, upon the hypothesis stated, those rights are precisely the same as if the depositary were not a bank. The authorities already cited leave no doubt that by an assignment for value the assignor parts with ownership of so much of the fund; as between him and the assignee the transfer is complete. He is not concerned in the question whether the depositary consents or not. Such consent only has the effect to confer upon the assignee a remedy to obtain from the fund holder that which is already his by the assignment. The conclusion would seem irresistible that when such consent is given, and the assignee has recovered his part of the fund by suit or otherwise, the depositary no longer holds it and cannot be liable for it to the original depositor. It is no answer to this view to suggest that, even though the depositary refuse consent, the fund is, upon this reasoning, none the less transferred out of the assignor, and he ought not to have an action for what is not his, which conclusion would produce the absurdity of the depositary being free from suit by anyone. In that case the depositor can, of course, recover against the depositary, not because the fund is his, but because the latter is estopped to deny such ownership by his own act in refusing to recognize the transfer. When, however, he does consent, and pays that which has been validly assigned to the assignee, he discharges to that extent all obligation, and the former owner of the fund has no rights against him.

That a transfer of the depositor's interest in the whole fund by operation of law and without value confers no higher rights

than he had is too well settled in Wisconsin [598] to warrant reconsideration even in deference to an apparent suggestion the other way by the supreme court of the United States in Laclede Bank v. Schuler, 120 U. S. 511, 515, 7 Sup. Ct. Rep. 644, which case, by the way, is much limited by Fourth St. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. Rep. 439. In Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847, Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426, and Dillman v. Carlin, 105 Wis. 14, 76 Am. St. Rep. 902, 80 N. W. 932, it is held that a receiver, an assignee for creditors, and a garnishing creditor stand in no better position than the original depositor. An administrator's rights are the same. He, too, "stands in the shoes" of his intestate.

But, says the appellant, the maker may revoke a check, and thereafter the bank has no right to pay it, and the maker's death is ipso facto a revocation when brought to the bank's knowledge. Except the last, these propositions are supported by a vast array of authority dating from the earliest recognition of the law-merchant, and, correctly understood, are not to be gainsaid. They, however, are applicable only to the relation between the maker and his bailee or depositary. Their use in a case like the present is due to failure to distinguish the two separate functions of a bank check as established in our jurisprudence. A check is, and always has been, primarily an authority from the maker upon which his banker may rely, but in which the latter has no interest until he has acted thereon. As such authority merely, it is, of course, revocable until acted on, and its revocation takes from the banker all the protection it would otherwise afford him as a mere authority or direction to pay. In that sense he thereafter has no right to pay, and such statement of the law is strictly accurate when and where a check is nothing more, though doubtless it has been used in other jurisdictions without the qualification necessary to its exact comprehension. Where, however, a check for a valuable consideration works an assignment of the deposit, equitable or legal, such a check is something more than a mere authority to pay. It also evidences a contract between the [599] maker and payee, and, if that contract is a valid and irrevocable one, the check cannot be revoked as between them. If, by that contract, the payee has become the owner of the fund, the bank may safely pay it to him, not by virtue of the check as an authority alone, but by virtue of his actual ownership. Before he is notified of any revocation, the banker will

be protected by the check as an authority, without regard to the validity of the contract of assignment; after notice of revocation, the latter fact alone can protect him. He then pays at the peril of being able to establish a valid and irrevocable contract of assignment. If that contract be otherwise, as, for example, if obtained by fraud, so that the maker of the check can rescind it as against the payee, doubtless the banker who pays a check in defiance of a revocation can base no defense thereon. This is the force of the declaration in Pease v. Landauer, 63 Wis. 28, 53 Am. Rep. 249, 22 N. W. 850, that the drawer cannot "arbitrarily" or "except for some good cause" stop payment and avoid the assignment; that such act would be a fraud.

In this view, then, we need not consider whether the death of the drawer revokes a check. If it does so, it is no more efficacious than a revocation by act of the party living. The law will not, of its own motion, work the same fraud which it would not permit a living person to perpetrate by his own act.

Perhaps this discussion ought not to close without a precautionary suggestion against carrying too far the logical deductions from the assertion that a partial assignment of a fund is effective to give the assignee complete ownership, except as he lacks right of action. This does not warrant the view that by any process of notice or demand he can impose on the nonconsenting depositary any duty to protect his equitable rights, or any trammels upon the latter's freedom in paying out the fund to others, either in solido or in parcels, as he pleases. At this point in the logic one is confronted [600] by what is elsewhere termed the "dominant consideration" of protecting completely the rights and the convenience of the depositary. His right to refuse consent to a partial transfer is absolute, and cannot be controlled: Dugan v. Knapp, 105 Wis. 320, 323, 81 N. W. 412; Smelker v. Chicago etc. Ry. Co., 106 Wis. 135, 139, 81 N. W. 994; Skobis v. Ferge, 102 Wis. 122, 136, 78 N. W. 430.

From what we have already said the conclusion must be manifest. Bromley, in his lifetime, having transferred the fund in question by his four checks for the very strongest consideration, namely, the receipt and incorporation into that fund of the payee's money, it belonged thereafter to the payee, and not to Bromley. The bank had absolute right to consent to and recognize such transfer. It did so, and has paid the fund to its owner. This constitutes a complete defense against any

demand for that money by either Bromley or his representative. Such defense is good in an action at law none the less because the bank might, at its election, have compelled the holder of the checks to sue in equity: Dobbs v. Kellogg, 53 Wis. 448, 10 N. W. 623. It might equally have consented to an action at law. The transfer from Bromley having been complete as against him in his lifetime, it was equally complete as against the plaintiff, his administrator; and the latter is shown by the facts proved and found to have no right of recovery. The judgment against him was therefore correct.

By the Court. Judgment affirmed.

A Check is an Assignment of the Funds of the drawer to the amount of the check, as between the drawer and the payee, when the check is given, but as between the payee or holder and the drawee, the check is not complete as an assignment until presentation for payment: Northern Trust Co. v. Rogers, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273; Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 54 N. E. 946; Whitehouse v. Whitehouse, 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374; Niblack v. Park Nat. Bank, 169 Ill. 517, 61 Am. St. Rep. 203, 48 N. E. 438; Abt. v. American etc. Bank, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856; Industrial Trust etc. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45, 15 South. 854. Compare Cincinnati etc. R. R. Co. v. Bank, 54 Ohio St. 60, 56 Am. St. Rep. 700, and cases cited in the cross-reference thereto, 42 N. E. 700. See a full discussion of this subject in the monographic notes to Sowden v. Craig, 96 Am. Dec. 132-135; In re Franklin Bank, 19 Am. Dec. 422, 423; Hemphill v. Yerkes, 19 Am. St. Rep. 609-612.

McQUILLAN v. MUTUAL RESERVE FUND LIFE ASSN.

[112 Wis. 665, 87 N. W. 1069.]

INSURANCE—WAIVER OF FORFEITURE.—**Retention by an insurance company of an overdue assessment for a reasonable time for the purpose of ascertaining whether the facts warrant a reinstatement of the forfeited policy under the company's by-laws, and to enable the insured to comply with conditions precedent to such reinstatement, does not waive the forfeiture caused by the payment of the overdue assessment.** (p. 987.)

INSURANCE—WAIVER OF FORFEITURE.—**The retention, without condition, of money paid to an insurance company for an installment due upon one of its policies, with knowledge of facts rendering the policy void, ratifies and affirms it as a subsisting obligation.** (p. 988.)

INSURANCE—WAIVER OF FORFEITURE.—**Retention by the insurer for an unreasonable time of money paid on an overdue assessment after a forfeiture of the policy has occurred to the**

knowledge of the insurer, without notifying the insured that any condition is affixed to such retention, notwithstanding a special request accompanying the money for an immediate return of evidence indicating that it has been received and applied for the purpose for which it is sent, constitutes a waiver of the forfeiture. (p. 988.)

INSURANCE—ASSIGNMENT—RIGHTS OF ASSIGNEE.—If an insurance policy is assigned with the consent of the insurer, thereby vesting in the assignee the whole beneficial interest therein, and rendering it necessary for the latter to make the payments essential to keep the policy alive, all notices required to be given to the owner of the policy must, after such assignment, be given to the assignee. (p. 989.)

INSURANCE — ASSIGNMENT — NOTICE OF DELINQUENCY.—If the assignee of an insurance policy, holding the whole beneficial interest therein, allows it to lapse for failure to pay an assessment when due, and thereafter makes payment thereof, he is not affected by any condition relating to the life of the policy, notice of which is not brought home to him by the insurer who retains the money; notice to the assignor is not sufficient. (p. 990.)

INSURANCE—RESTRAINTS ON ASSIGNMENTS.—An insurance company may, by contract, place such restraints upon the assignment of its policies as it sees fit, not inconsistent with its own or some other law. It may thus limit its liability to the amount due the assignee from the assignor at the time of his death, and payments made by the former to keep the policy alive. (p. 990.)

C. T. Hickox, for the appellant.

W. H. Frawley and J. Wickham, for the respondent.

670 MARSHALL, J. As we view this case, several reasons advanced for a reversal, and several reasons given in support, of the judgment, need not be considered. The pleadings admit, or the evidence establishes beyond controversy, that payment of the assessment of August 31, 1898, was made by the city of Eau Claire, the owner of the policy, several days too late; that the money was retained by appellant several months with knowledge of all the facts, before its duty to refund the same, or be bound to consider mere time of payment thereof immaterial, was recognized; that no notice whatever that the money was conditionally received and retained was given to the owner of the policy; and that no valid tender back of the money was made to such owner or to 671 anyone. The mere retention of the money for a reasonable length of time, for the purpose of ascertaining whether the facts warranted a reinstatement of the forfeited policy under the company's by-laws, and enabling the assured to comply with the conditions precedent to such reinstatement, did not waive the forfeiture caused by the late payment, if we give effect to the conditional receipt: Rockwell v. Mutual etc. Ins. Co., 20 Wis. 335; Miles v.

Mutual Reserve Fund Life Assn., 108 Wis. 421, 84 N. W. 159; Ronald v. Mutual Reserve Fund Life Assn., 132 N. Y. 378, 30 N. E. 739; Lewis v. Phoenix Mutual Life Ins. Co., 44 Conn. 72; Crossman v. Massachusetts etc. Assn., 143 Mass. 435, 9 N. E. 753; Unsell v. Hartford etc. Ins. Co., 32 Fed. 443. That rule, however, did not militate against a waiver of the forfeiture occurring by appellant's retention of the money long after it ascertained the facts as to the ability of McQuillan to secure reinstatement of his membership under its by-laws. In Miles v. Mutual Reserve Fund Life Assn., 108 Wis. 421, 84 N. W. 159, the rule deduced from the authorities was that acceptance of an overdue assessment on condition that the assured is in good health does not waive a forfeiture caused by the delinquency, if the member is not then in good health and the assurer offers, promptly, to return the money upon discovering that fact. In the absence of any provision of the contract or circumstance to effect a different result, the general rule applies, that the retention of money paid to an insurance company, for an installment due upon one of its policies, with knowledge of facts rendering the policy void, ratifies and affirms it as a subsisting obligation: Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35; Erdmann v. Mutual Ins. Co., 44 Wis. 376; Underwood v. Iowa Legion of Honor, 66 Iowa, 134, 23 N. W. 300; Shea v. Massachusetts etc. Assn., 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Gray v. National Ben. Assn., 111 Ind. 531, 11 N. E. 477. In this case appellant retained the money paid upon the policy after a forfeiture had occurred, without notifying the owner that any condition was affixed to such retention, notwithstanding a special request accompanied the money for [672] an immediate return of evidence indicating that it had been received and applied for the purposes for which it was sent. Doubtless the rule stated in Shea v. Massachusetts Ben. Assn., 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855, cited to our attention by respondent's counsel, that the owner of the policy, where money is paid too late, is entitled to have notice brought home to him of any condition affixed to the retention thereof, is correct and should be applied to this case. Here, appellant, with full knowledge that the policy of insurance had ceased to be binding upon it if it saw fit to insist upon the full effect of the late payment of the assessment, not only retained the money and kept silent, so far as notifying the owner of the policy of its attitude, till the death of the assured, but continued in such

attitude till such owner had been put to the trouble and expense of making and transmitting proofs of death, and for a long time thereafter. There can be no question but that, under such circumstances, an insurance company is bound by its conduct indicating a waiver of the forfeiture. The law is so well settled that forfeitures are not favored by courts, and that circumstances similar to those which characterized the conduct of appellant irrevocably indicate an intention on the part of the assurer to treat the insurance contract as subsisting, that no complaint can reasonably be made by appellant because its conduct is held to result that way. When the money for the assessment was received, appellant not only knew the policy of insurance was forfeited, but knew that the money came from the party that, under the terms of the insurance contract, was the owner of the entire beneficial interest therein, and that such party desired the money to be received and retained unconditionally or not at all, and to have evidence of appellant's position in that regard by due course of the mails. Nevertheless it kept the money without making any attempt to reach the owner of the certificate with information that a condition was affixed to such retention, and its attitude, so far as regards 673 such owner, was not changed until the latter had been put to the trouble and expense of making proofs of death, and did not change at all by any legitimate offer to return the money. That such conduct constitutes a waiver of the default in making payment in time is too clear for discussion.

Appellant, from the beginning to the end of this controversy, seems to have assumed that the city of Eau Claire, the owner of the policy, was bound by the receipt claimed to have been sent to McQuillan. If that were so, it would not avail appellant, as we have seen, because of its failure to return the money seasonably after receiving knowledge of facts rendering compliance with the conditions named in the receipt impossible. While appellant insists that McQuillan and his wife parted absolutely with the policy by the assignment, except his interest in having it extinguish his liability to the city, that situation seems to have been entirely overlooked, so far as it bears on appellant's transactions with him in respect to the receipt. When the assignment of the policy was perfected, the city became substituted, for most purposes, for McQuillan and for his wife as well. All communications thereafter, by the association, affecting the validity of the insurance contract, were due to the new party, and it was not affected by any made to

McQuillan any more than it would have been by communications made to a mere stranger to the contract. We cannot see any excuse for appellant's neglect in that regard. It not only knew the city was the sole and unconditional owner of the policy, but that, under the conditions of its ownership, it was expected to keep up the payments thereon, was, to all intents and purposes, except the mere circumstance necessary to the maturity of the contract of insurance, substituted for McQuillan and his wife: Bowen v. National L. Assn., 63 Conn. 460, 27 Atl. 1059. From this it will be seen that the conditional receipt is immaterial to appellant's liability. The case stands the same, as regards total forfeiture of the [674] insurance contract, as if McQuillan had not assigned it, and had made the payment in question accompanied by a request for immediate notification as to whether a forfeiture would be insisted upon, and the money had been retained without any condition being brought home to him, as in Shea v. Massachusetts Ben. Assn., 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855, which, the court there said, was fatal to the claim of forfeiture.

What has been said does not militate against appellant's insisting upon the right to recover being limited to the amount due the city of Eau Claire from McQuillan when he died, with interest. As before indicated, the McQuillans irrevocably parted with all interest in the policy by the assignment. The condition in that regard may be considered harsh, but courts must enforce contracts as they find them. If a person sees fit to make an insurance contract so that an assignment thereof to one of his creditors will have the effect of limiting all liability thereon to the amount due such creditor from him at the time of his death, there is no law to prevent it, and he and those who come after him must abide thereby. There can be no question but that an insurance company may, by contract, place such restraints upon the assignment of its insurance policies as it sees fit, not inconsistent with its own laws or some statute: Niblack on Benefit Societies and Accident Insurance, secs. 168, 169. We cannot escape the conclusion that, by the terms of the contract before us, respondent must suffer, as a penalty for the assignment of the policy, the loss of all interest therein. That is as plainly stipulated in the policy as language can make it. The effect thereof, and of the assignment, was to substitute a new contract for the policy as originally written, with like conditions, except that the liability of the assurer was limited solely to the city of Eau Claire and to the

amount due the city from McQuillan at the time of his death, including payments by it to keep up the policy and interest thereon, not exceeding in all the amount payable under the contract in the absence of the [675] assignment. The amount of the city's claim, including payments made to keep the policy alive, and interest up to August 11, 1899, was twenty dollars and thirteen cents. The right of action therefor passed to the plaintiff by the assignment made to her by the city before the commencement of this suit. Such right constitutes plaintiff's only claim against appellant.

Some questions are discussed in appellant's brief to which we have not alluded, but so far as they could in any event affect the result of the appeal they have been considered, but are not deemed of sufficient significance to justify speaking of them specifically.

By the Court. The judgment of the circuit court is reduced to twenty dollars and thirteen cents and interest thereon from August 11, 1899, and costs as taxed, and is affirmed as modified, costs in this court to go in favor of the appellant.

Bardeen, J., took no part.

Life Insurance.—The receipt by an insurer of overdue premiums or dues on a policy of life insurance is a waiver of the condition of forfeiture for nonpayment thereof when due: Supreme Tribe of Ben Hur v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 272, and cases cited in the cross-reference note thereto, 56 N. E. 780.

The Assignment of Life Insurance policy is considered in the recent extended note to Chamberlain v. Butler, 87 Am. St. Rep. 484-519.

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See Criminal Law, 2, 8.

ACCIDENT INSURANCE.

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ACKNOWLEDGMENT.

1. ACKNOWLEDGMENT.—COURTS CONSTRUE the language of certificates of acknowledgments liberally, and uphold them if it can be done by a fair and reasonable construction. But no intendments or presumptions are indulged in their favor. (McCardia v. Billings, 729.)

2. A CERTIFICATE OF ACKNOWLEDGMENT WILL BE UPHELD as against the unsupported evidence of the person certified to have executed it. (McCardia v. Billings, 729.)

3. ACKNOWLEDGMENT—CLERICAL ERROR.—A certificate of acknowledgment reciting that A and B appeared before the notary, and were known by him to be "the person who are described in and who executed" the foregoing instrument, and acknowledged "that he executed the same," is not fatally defective. (McCardia v. Billings, 729.)

4. ACKNOWLEDGMENT CURED BY STATUTE.—An acknowledgment of a foreclosure sale by a deputy sheriff, irregular in not being made on behalf of the sheriff as well as for himself, is cured by section 3585 of the Revised Codes of North Dakota. (McCardia v. Billings, 729.)

ACTIONS.

1. ACTION.—THE FAILURE OF A PLAINTIFF TO STATE FACTS TO SHOW THAT HE IS ENTITLED TO EQUITABLE RELIEF is no excuse for the commencement of an independent action upon the single cause involved in the first action. (Hahl v. Sugo, 539.)

2. CAUSES OF ACTION—RECOVERING LAND—LEGAL AND EQUITABLE RELIEF.—Where the plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of his house, such facts show but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. (Hahl v. Sugo, 539.)

3. CAUSE OF ACTION.—THE RELIEF PRAYED FOR, or to which a plaintiff may be entitled, is no part of his cause of action. (Hahl v. Sugo, 539.)

4. PRACTICE.—SEPARATE CAUSES OF ACTION—WHEN RESULT FROM A SINGLE TORT.—If a person and his vehicle in which he is riding are both injured by a single act of negligence, two causes of action arise in his favor, and a recovery of judgment by him for damages to his vehicle does not preclude a subsequent recovery for injuries to his person. (Reilly v. Sicilian Asphalt Pav. Co., 636.)

5. PRACTICE.—A SINGLE AND ENTIRE CAUSE CANNOT BE SUBDIVIDED into several claims and separate actions maintained thereon. (Reilly v. Sicilian Asphalt Paving Co., 636.)

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ADVERSE POSSESSION.

1. ADVERSE POSSESSION MUST BE HOSTILE and under a claim of right, and not in recognition of the title of the real owner. (Alsup v. Stewart, 169.)

2. MORTGAGES—ADVERSE POSSESSION—GRANTEE OF MORTGAGOR.—PAYMENT OF TAXES by the grantee of a mortgagor in possession of the mortgaged premises, which he is bound to pay, does not constitute adverse possession. Such possession must be an actual, visible, exclusive appropriation of the land, commenced and continued under a claim of right. (Alsup v. Stewart, 169.)

3. MORTGAGES—ADVERSE POSSESSION BY GRANTEE OF MORTGAGOR.—The possession of a grantee of a mortgagor is in subordination to the title of the mortgagee to the same extent as that of his grantor, and it cannot cease to be of that character until there is an open assertion of a distinct title with the knowledge of the mortgagee. (Alsup v. Stewart, 169.)

4. MORTGAGES—ADVERSE POSSESSION.—POSSESSION BY A MORTGAGOR OR HIS GRANTEE is consistent with the rights and estate of the mortgagee, and in no sense adverse until a repudiation of the mortgage and a denial of the right and title of the mortgagee, so open and notorious that knowledge on his part must be presumed. (Alsup v. Stewart, 169.)

5. ADVERSE POSSESSION.—COLOR OF TITLE is that which in appearance is title, but which in reality is no title. (Power v. Kitching, 691.)

6. COLOR OF TITLE.—A TAX DEED VOID on its face may constitute color of title on which to found a title by adverse possession. (Power v. Kitching, 691.)

7. TITLE BY ADVERSE POSSESSION MAY BE ACQUIRED, in North Dakota, by actual, open, adverse, and undisputed possession for ten years, with payment of taxes and assessments. (Power v. Kitching, 691.)

8. ADVERSE POSSESSION.—A CLAIM OF TITLE MAY REST upon a writing, or a decree of court, or in parol. (Power v. Kitching, 691.)

9. ADVERSE POSSESSION.—THE PAYMENT OF TAXES is not, independently of statute, essential to acquiring title by adverse possession. (Power v. Kitching, 691.)

AGENCY.

1. AGENCY—POWER TO RATIFY UNAUTHORIZED ACTS. An agent with authority to do certain lawful things cannot, by virtue of that authority, ratify his own unlawful and unauthorized acts so as to bind his principal. (Fay v. Slaughter, 148.)

2. AGENCY—EMBEZZLEMENT BY AGENT—LIABILITY OF PRINCIPAL.—If an agent forges his principal's name to securities and sells them through brokers, who fail to ascertain the genuineness of the indorsements, the fact that the agent embezzles the proceeds of the check given in payment by virtue of a power of attorney to indorse and draw checks during the absence of the principal does not render the latter liable to the brokers for the embezzlement, if he repudiates the sale immediately upon ascertaining the facts. The fact that the existence of the power of attorney was unknown to the brokers is immaterial. (Fay v. Slaughter, 148.)

3. AGENCY—LIABILITY OF AGENT FOR ACT OF SUB-AGENT—PRESUMPTION.—A general agent who employs a subagent and invests him with certain authority is liable for, and conclusively presumed to know of, all acts performed by the subagent within the scope of the authority given to him. (Franklin Fire Ins. Co. v. Bradford, 770.)

4. AGENCY—FORGERY.—An agent who signs his principal's name in the course of the latter's business, without fraudulent intent, and without benefit to himself, is not guilty of forgery. (Franklin Fire Ins. Co. v. Bradford, 770.)

5. AGENCY—LIABILITY FOR UNAUTHORIZED ACT OF AGENT WITHIN SCOPE OF EMPLOYMENT.—A principal is civilly liable to third persons for the acts, even if tortious, of his agent, if done in the course of his employment, although the principal did not authorize the acts or may have forbidden them. (Franklin Fire Ins. Co. v. Bradford, 770.)

6. AGENCY—LIABILITY FOR ACTS OF AGENT.—A principal who has conferred general power on his agent cannot escape liability for a particular act of the latter, within the scope of the general power. (Franklin Fire Ins. Co. v. Bradford, 770.)

7. AGENT'S LIABILITY FOR UNSAFE PREMISES.—An agent is not answerable to a trespasser for the unsafe condition of premises of which he is not in possession and as to which his authority is limited to leasing and collecting rents. (Kuhnert v. Angell, 675.)

8. AGENT'S LIABILITY FOR UNSAFE FENCE.—An agent who leases land and collects the rents for the nonresident owner is not liable for the unsafe condition of a fence on the property which his principal instructs him to have built and which is constructed by a subagent. (Kuhnert v. Angell, 675.)

9. AGENCY—PRINCIPAL, WHEN BOUND.—A principal is bound by the acts of his agent, whether general or special, within the authority he has actually given him, including not only the precise act expressly authorized, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is bound by the acts of the agent within the apparent authority which the principal knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. (Rohrbough v. United States Express Co., 849.)

10. AGENCY.—POWERS OF AGENTS MUST BE EXERCISED FOR THE BENEFIT OF THEIR PRINCIPALS only and not of themselves or third persons; and if the agent acts otherwise, with the knowledge and consent of the person relying upon his unauthorized act, the principal is not bound. (Rohrbough v. United States Express Co., 849.)

11. AGENCY—DISREGARD OF INSTRUCTIONS—PRINCIPAL, WHEN BOUND.—If an agent disregards specific instructions as to the mode of executing his powers, his acts are, nevertheless, binding upon his principal as regards third parties having no notice of such instructions in respect to a matter as to which the agent is held out to the public as having full authority. (Rohrbough v. United States Express Co., 849.)

12. AGENCY—IMPLIED POWERS.—If an agent is commissioned to do any act, nothing being said as to the mode of performance, he has implied power to perform his duties in accordance with any recognized usage or mode of dealing. (Rohrbough v. United States Express Co., 849.)

13. AGENCY—ACTS OF SUBAGENTS OUTSIDE POWER OF AGENT.—If an agent of an express company intrusts to another, not in the employ of the company, and without its knowledge, the transaction of its business under his control, and such subagent solicits and receives money deposits in exchange for money orders of the company issued by him without payment of the usual fees, and absconds with the money, a depositor, knowing that the issue of such money order is beyond the power of the agent for whom the subagent professes to act, cannot recover thereon from the express company. (Rohrbough v. United States Express Co., 849.)

14. AGENCY—POWER OF AGENT TO EMPLOY SUBAGENT. An agent has no power to delegate his agency to another, or to sublet it, but may employ clerks or subagents, whose acts, if done in his name, and recognized by him, either specially or according to his usual mode of dealing with them, are regarded as his acts, and as such binding on his principal. (Rohrbough v. United States Express Co., 849.)

15. AGENCY—LIABILITY FOR ACT OF SUBAGENT.—An insurance company is liable upon a policy properly signed and delivered by a subagent of its authorized agent without the actual knowledge of the latter, and although the company has expressly forbidden its agent to insure the property covered by the policy. (Franklin Fire Ins. Co. v. Bradford, 770.)

16. AGENCY—LIABILITY OF AGENT FOR ACT OF SUBAGENT.—An insurance agent with power to sign and issue policies and to collect premiums, who hires a subagent and permits him to sign and deliver policies and collect premiums, is liable to the insurance company for the act of the subagent in issuing a policy and collecting the premium, without the actual knowledge of the agent, on property which he as agent for the company has been expressly forbidden to insure. (Franklin Fire Ins. Co. v. Bradford, 770.)

17. SUBAGENT.—AN AGENT IS NOT RESPONSIBLE for the negligence or want of skill of a subagent whose employment was necessary and in whose selection he used reasonable diligence. (Kuhnert v. Angell, 675.)

18. AGENCY—POWER OF ATTORNEY—INDORSEMENT OF CHECKS.—Power of attorney given to an agent to indorse checks of the principal for deposit in a certain bank authorizes the indorsement of such checks only as are the property of the principal, and

not those acquired by the agent in an unlawful or unauthorized manner. (Fay v. Slaughter, 148.)

19. POWERS OF ATTORNEY COUPLED WITH AN INTEREST, or given for a valuable consideration, or as part of a security, unless expressly made revocable, are irrevocable, whether their irrevocability is expressed or not. (Chapman v. Bates, 459.)

See Evidence; Brokers.

ALIBI.

See Instructions, 2.

ALIEN.

See Death.

ALIMONY.

See Marriage and Divorce.

APOTHECARIES.

See Druggists.

APPEAL AND ERROR.

1. APPELLATE PRACTICE—APPEAL BONDS.—If, on an appeal, no order is made requiring an appeal bond, and no motion is made requiring such bond, the appellant must be deemed to have waived the filing of such bond, and cannot insist upon a motion to dismiss the appeal in the supreme court. (Sherwood v. Illinois Trust etc. Bank, 183.)

2. APPEALS—CRIMINAL CASES.—UNDER THE NEW YORK CONSTITUTION, the provisions which limit appeals to the court of appeals to certain classes of cases have no application to criminal cases. (People v. Miller, 546.)

3. APPELLATE PRACTICE.—ON REVIEWING JUDGMENTS in cases tried by the court without a jury, the appellate court treats them as standing on demurrers to the evidence. (Rohrbough v. United States Express Co., 849.)

4. APPEAL—MOTION FOR NEW TRIAL.—IT IS OPTIONAL with the moving party in jury cases to move or not to move for a new trial in the district court; but if the motion is not made below, no review of questions of fact can be had in the supreme court. (Ness v. Jones, 755.)

ASSIGNMENT.

1. ASSIGNMENT OF PORTION OF FUND—RIGHTS OF PERSONAL REPRESENTATIVE.—The personal representative of a deceased depositor who has assigned a portion of the fund stands in no better position with reference to such fund than the original depositor. (Raesser v. National Exchange Bank, 979.)

2. ASSIGNMENT OF PORTION OF FUND.—By an assignment of a portion of a fund in the hands of a depositary, the assignor parts with the ownership of such portion, and as between himself and the assignee the transfer is complete, whether the depositary consents to the assignment or not. (Raesser v. National Exchange Bank, 979.)

3. ASSIGNMENT OF PORTION OF FUND—RIGHTS OF DEPOSITARY.—The right of a depositary of a fund to refuse consent to a partial assignment thereof is absolute and cannot be controlled, and the assignee cannot, by any process of notice or demand, impose on the nonconsenting depositary any duty to protect his equitable rights. (Raesser v. National Exchange Bank, 979.)

4. ASSIGNMENT OF PORTION OF FUND—CONSENT OF DEPOSITARY.—If the depositary of a fund consents to the assignment of a portion thereof, he thereby merely confers upon the assignee a remedy to obtain from him that which is already his by the assignment. (Raesser v. National Exchange Bank, 979.)

5. ASSIGNMENT OF PORTION OF FUND—EFFECT OF PAYMENT.—By payment to an assignee of a portion of a fund in the hands of a depositary, the latter discharges pro tanto all obligation, and the assignor has no rights against him in respect thereto. (Raesser v. National Exchange Bank, 979.)

See Contracts, 3; Insurance, 2-4; Landlord and Tenant.

ASSOCIATIONS.

See Benefit Societies.

ATTORNEY'S FEES.

ATTORNEY'S FEES MAY BE ALLOWED A GUEST as part of his damages when the innkeeper capriciously refuses to deliver his trunk or baggage-check, and he is compelled to employ counsel to enforce his rights. (Carhart v. Wainman, 45.)

AUCTION.

A BIDDER AT AN AUCTION SALE MAY WITHDRAW his bid at any time before the hammer falls or the property is knocked off to him. (Tillman v. Dunman, 28.)

BAGGAGE.

See Innkeepers.

BAILMENT.

1. BAILMENT.—IF THE OWNER OF A CITY BOND, having on its back an assignment in blank executed by its former owner, intrusts it to another for safekeeping in a city where there is a usage to treat bonds so indorsed as the property of the bearer, he does so charged with notice of the power to deceive which he is putting in that other's hands, and if deception follows he must bear the burden. (Scollans v. Rollins, 386.)

2. CONVERSION OF BOND BY BAILEE—BONA FIDE PURCHASER.—If the owner of a bond hands it to a stock broker for safekeeping, and the broker places it in an envelope upon which is the owner's name and words "Private property," and also places therein at the owner's request an insurance policy, and seals the envelope in the presence of the owner and places it in the safe, this does not show an intrusting of the bond to the broker, but a bailment of the envelope under seal. Hence, if the broker pledges the bond for his own debt, and it comes to a bona fide purchaser, the owner is not estopped to assert title. (Scollans v. Rollins, 386.)

BANKRUPTCY.

BANKRUPTCY—LIENS.—THE EFFECT OF THE BANKRUPTCY ACT OF 1898, section 67f, chapter 541, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee and those claiming under him, so that the property may pass to and be distributed by him amongst the creditors of the bankrupt. (Frazee v. Nelson, 391.)

BANKS AND BANKING.

1. BANKS AND BANKING—CHECK AS ASSIGNMENT OF DEPOSIT.—A check given for value on an ordinary bank deposit is an assignment of the fund pro tanto, as between the maker and the payee. (Raesser v. National Exchange Bank, 979.)

2. BANKS AND BANKING—CHECKS—DEATH AS REVOCATION.—The death of the maker of a check is no more efficacious as a revocation of authority to pay, than a revocation by the act of the maker living. (Raesser v. National Exchange Bank, 979.)

3. BANKS AND BANKING—CHECK AS ASSIGNMENT OF FUND—REVOCATION.—A bank check for a valuable consideration constitutes an assignment of that portion of the deposit covered thereby, and not only authorizes the bank to pay, but also evidences a contract between the maker and payee, not revocable except for good cause, and if the bank pays after notice of revocation, its only peril is ability to show a valid and irrevocable contract of assignment. (Raesser v. National Exchange Bank, 979.)

4. BANKS AND BANKING—COLLECTIONS—RIGHT TO CREDIT PROCEEDS ON OVERDRAFT.—A blank indorsement of a check by the payee transfers a good title to the holder, free from all equities in the payee's favor, and a bank receiving from another bank a check indorsed in blank by the payee is authorized to collect it, credit the proceeds to the forwarding bank, honor its drafts against the credit, or apply the proceeds to the reduction of an overdraft upon it by the forwarding bank. The payee cannot, upon the insolvency of the latter bank, recover such proceeds from the bank making the collection, without proof that the latter had notice that the forwarding bank received the check merely as the payee's agent for collection. (American Exchange Nat. Bank v. Theummler, 177.)

BENEFIT SOCIETIES.

1. BENEFIT SOCIETIES—"RELATIVES," WHO ARE.—If the constitution and by-laws of a benefit society provide that its benefit fund shall be "for the purpose of assisting the widows, orphans or other relatives of deceased members," the word "relatives" includes relatives by marriage as well as relatives by blood. (Tepper v. Supreme Council etc., 449.)

2. BENEFIT SOCIETIES—BENEFICIARIES—STEPCHILDREN AS MEMBERS OF FAMILY.—If the constitution and by-laws of a benefit society permit benefits to be made payable to "the members of the family" of a member as designated by him, he may lawfully designate his stepchildren, brought up in his family as his beneficiaries, even after they have married and left his household. (Tepper v. Supreme Council etc., 449.)

3. BENEFIT SOCIETIES—WAIVER OF MISDESCRIPTION OF BENEFICIARY.—If a member of a benefit society in naming his beneficiaries misdescribes their relation to him, the society may

waive the defect and ratify the agreement, and if it answers averring its willingness to pay after full notice of the truth, this constitutes such waiver and ratification. (Tepper v. Supreme Council etc., 449.)

4. BENEFIT SOCIETIES—BENEFICIARIES—MISDESCRIPTION.—If a member of a benefit society, in naming his stepchildren as his beneficiaries, describes them as "my children," such misdescription, if material, can be taken advantage of only by the society, and cannot be objected to by a rival claimant to the benefit fund. (Tepper v. Supreme Council etc., 449.)

BICYCLISTS.

See Railroads, 8-10.

BIDDERS.

See Auction; Executors and Administrators; Municipal Corporations, 4.

BILLS AND NOTES.

See Negotiable Instruments.

BILLS OF LADING.

See Carriers.

BILL OF PARTICULARS.

See Pleading.

BLACKLISTING.

See Railroads, 13, 14.

BONDS.

See Negotiable Instruments, 5, 6.

BOYCOTT.

BOYCOTT.—A PLAINTIFF CANNOT ENJOIN A VOLUNTARY UNINCORPORATED ASSOCIATION from fining or expelling one of its members for his violation of a by-law of the association prohibiting him from trading with the plaintiff, or from trading with others who do trade with him, since the plaintiff is only affected in an indirect way. (Downes v. Bennett, 256.)

BROKERS.

1. REAL ESTATE BROKER—DISMISSAL.—The owner of real estate has a right to dismiss a broker employed to procure a purchaser at any time before a customer is found. (Cadigan v. Crabtree, 397.)

2. IF A BROKER EMPLOYED TO PROCURE A TENANT IS DISMISSED before a lease is consummated, but a tenant with whom he negotiated is subsequently accepted, he is not entitled to a commission, when he does not show that the tenant offered to

him prior to his dismissal substantially the terms ultimately accepted. (Cadigan v. Crabtree, 397.)

3. A BROKER EMPLOYED TO PROCURE A TENANT on terms fixed by the owner is not entitled to a commission, if he procures an offer from a tenant different from the terms so fixed by the owner, though such owner subsequently leases through another broker to the person who made such offer, and substantially on the terms of the offer made to and reported by the first broker. (Cadigan v. Crabtree, 397.)

4. A BROKER IS NEVER ENTITLED TO RECOVER ON A QUANTUM MERUIT for work done, when he has not been successful in finding a customer for his principal. (Cadigan v. Crabtree, 397.)

5. A BROKER IS NOT ENTITLED TO ANY COMPENSATION, no matter how much time he has devoted to find a customer, provided a customer is not found. (Cadigan v. Crabtree, 397.)

BUILDING AND LOAN ASSOCIATIONS.

BUILDING AND LOAN ASSOCIATIONS—DOING BUSINESS IN ANOTHER STATE—USURY.—A building and loan association, having its office in the state of its domicile, where, under its constitution and by-laws, its business must be conducted, all payments made, and all contracts passed upon, does not, by making a loan in another state to a citizen thereof, through its agent therein, and taking a mortgage on land therein as security, make a contract governed by the usury laws of the latter state, nor does it do business therein within the meaning of a statute requiring the registration of foreign corporations. In such case the contract is made and to be performed at the domicile of the corporation. (People's Bldg. etc. Assn. v. Berlin, 764.)

BURGLARY.

1. BURGLARY.—RECENT POSSESSION OF THE STOLEN PROPERTY by one accused of burglary, not satisfactorily explained, is a circumstance upon which the jury is authorized to infer his guilt. But it does not create a presumption of law against him, and is not of itself conclusive. (Gravitt v. State, 63.)

2. BURGLARY.—A VERDICT OF GUILTY OF BURGLARY IS UNWARRANTED if the evidence, when viewed most strongly against the accused, only authorizes the inference that he is guilty of receiving stolen goods. (Gravitt v. State, 63.)

CARRIERS.

1. CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may, in consideration of a special freight rate or other valuable consideration, contract for exemption from liability as an insurer for loss or damage to property carried not caused by negligence or willful misconduct. (Ullman v. Chicago etc. Ry. Co., 949.)

2. CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier cannot, by contract, avoid entirely the common-law liability for his negligence in the carriage of property, nor arbitrarily limit his liability in case of loss by negligence, without regard to the value of the property, but he may by contract liquidate such loss or damage in advance upon an actual or maximum value basis agreed upon and stated in the contract. (Ullman v. Chicago etc. Ry. Co., 949.)

3. CARRIERS—LIMITATION OF LIABILITY.—A common carrier may by contract fix the measure of its liability for negligence on a value basis of the property carried. (Ullman v. Chicago etc. Ry. Co., 949.)

4. CARRIERS—CONTRACTS LIMITING LIABILITY—ASSENT OF SHIPPER.—If a contract limiting the liability of a common carrier is contained in a bill of lading which, in its entirety constitutes both a receipt and a contract, it is not binding upon the shipper unless assented to by him. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

5. CARRIERS—CONTRACT LIMITING LIABILITY—QUESTIONS NOT REVIEWABLE ON APPEAL.—Whether a shipper assented to limitations of liability contained in a bill of lading, and whether the negligence causing the injury complained of was gross, are questions of fact conclusively settled by the judgment of the trial court, and cannot be reviewed on appeal. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

6. CARRIERS—LIMITATIONS ON POWER TO LIMIT LIABILITY.—A common carrier cannot, even by express contract, exempt itself from liability resulting from gross negligence or willful misconduct committed by itself or its servants or employés. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

7. CARRIERS—BILLS OF LADING—SHIPPER'S ASSENT TO TERMS OF.—If a bill of lading issued by a carrier states the value of the property received for shipment, or the maximum value thereof, the shipper, by receiving such bill of lading without objection, thereby assents to the value of the property delivered as stated therein. (Ullman v. Chicago etc. Ry. Co., 949.)

8. CARRIERS—CONTRACTS LIMITING LIABILITY—VALUATION AS BASIS.—A common carrier may, by contract made with the shipper, on a value basis of the subject of transportation, limit liability for loss or damage through his negligence to actual loss upon such basis. The agreed value may be either the maximum or actual value of the property. (Ullman v. Chicago etc. Ry. Co., 949.)

9. CARRIERS—BILL OF LADING—MEANING OF WORD "ACCIDENT."—The word "accident," when used in a bill of lading as referring to events involving damage to the property carried for which the carrier is to be liable, includes the result of any human fault which constitutes actionable negligence. Such word is not synonymous with "mere accident" or "purely accidental," and means directly the opposite. (Ullman v. Chicago etc. Ry. Co., 949.)

10. CARRIERS.—THE BURDEN OF PROOF IS UPON a carrier to show the assent of a shipper to a stipulation in a bill of lading limiting the former's liability. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

11. RAILROADS.—IF REGULATIONS OF RAILROADS as common carriers are obviously reasonable on their face, it is not necessary for the court to instruct the jury to find that fact. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

12. RAILROADS—RULES BINDING ON CONSIGNEE.—A consignee of goods impliedly contracts to submit to all reasonable rules for the regulation of shipments adopted by a railroad company, and the fact that the shipper was not consulted in framing such rules does not affect their validity. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

13. COMMON CARRIERS—FREIGHT AND DEMURRAGE.—There is no duty on a common carrier to consult either its shippers

or consignees as to the wisdom of its rates of freight for carrying, or rules for demurrage. As to the one, it cannot exceed a lawful rate, and as to the other, it cannot exceed a reasonable charge. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

14. RAILROADS—DEMURRAGE—NOTICE OF RULE—DEFENSE.—A shipper cannot allege as a defense want of knowledge of a rule of a railroad company relating to demurrage on cars, when he has regularly received monthly bills for violation of such rule. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

15. RAILROADS—RULES FOR UNLOADING CARS.—A railroad has a right as a common carrier to make reasonable rules to speed the unloading of its cars, as cars are for transportation and not for the storage of freight. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

16. RAILROADS—RULE FOR UNLOADING CARS.—A rule adopted by a railroad company that "a charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee, for each day, or part of day, after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car," is reasonable and enforceable. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

See Railroads.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE.—THE DESCRIPTION in a chattel mortgage is sufficient, if it will enable third persons to identify the property, when aided by such inquiries as the instrument suggests. (Reynolds v. Strong, 680.)

2. CHATTEL MORTGAGE OF EARNINGS OF THRESHING RIG.—THE DESCRIPTION, in a chattel mortgage, of the future earnings of an engine and separator, is sufficient though it does not designate their numbers, if it states their size and power, the names of the manufacturer and the owner and operator, the county where they are to be operated, and the time in which, and the place where the earnings are to accrue. (Reynolds v. Strong, 680.)

3. CHATTEL MORTGAGE.—THE FUTURE EARNINGS OF A THRESHING RIG may be the subject of a chattel mortgage. (Reynolds v. Strong, 680.)

4. A CHATTEL MORTGAGE OF THE FUTURE EARNINGS OF A THRESHING RIG is not void, because the persons against whom the earnings are to accrue are not named. (Reynolds v. Strong, 680.)

5. MORTGAGE SALE OF PERSONALTY IN CUSTODY OF LAW.—If a chattel mortgagee, under a power of sale in the mortgage, advertises the property for sale, but prior to the sale and subsequently to the advertisement, the property is seized under an execution held by a third person, the sale passes no title. (Fulghum v. J. P. Williams Company, 48.)

6. MORTGAGE OF GOODS ALLOWING SALES—WHEN VALID.—A chattel mortgage on a stock of merchandise, allowing the mortgagor to remain in possession and sell the goods, is valid, if the sales are for the benefit of the mortgagee. (Bergman v. Jones, 739.)

7. MORTGAGE OF GOODS ALLOWING SALES—WHEN VOID.—A chattel mortgage on a stock of merchandise, allowing the mortgagor to remain in possession and sell the goods, is void as to his creditors, if its effect is to hinder and delay them, and to protect the mortgagor in the further prosecution of his business, rather than secure the mortgage debt. (Bergman v. Jones, 739.)

8. A CHATTEL MORTGAGE BY AN INSOLVENT PARTNERSHIP to secure the debts of its members, which it is under no obligation to pay, is void as to creditors. (Bergman v. Jones, 739.)

CHECKS.

See Banks and Banking.

COLOR OF TITLE.

See Adverse Possession.

COMBINATION IN BUSINESS.

1. COMBINATIONS IN BUSINESS.—The mere operation of a lawful business by lawful means as a combination between corporations or individuals to draw to themselves business from other competitors, however hurtful to the latter, is not a conspiracy which is actionable. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

2. COMBINATIONS IN BUSINESS cannot be made the subject of an action, though damage to competitors resulting therefrom, unless something is done which without the combination would give a right of action. An agreement between corporations or individuals, for the sole purpose of getting trade into one corporation or person, though it causes damage to others, is not actionable. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

3. COMBINATIONS IN BUSINESS not in the free competition of trade nor for the sole benefit of the business but to induce the withdrawal of custom from another, solely for the purpose of wantonly injuring him, is actionable as an unlawful conspiracy. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

4. COMBINATIONS IN BUSINESS, wantonly and maliciously formed to induce a person to violate his contract with a third person, to the injury of the latter, are unlawful and actionable. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

5. CORPORATIONS—LIABILITY FOR TORTS—CONSPIRACY.—A corporation is liable for its torts, and may be liable for a combination or conspiracy with other corporations or persons, aimed at and accomplishing the injury of other corporations or persons. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

CONFLICT OF LAWS.

1. CONFLICT OF LAWS.—ALL MATTERS BEARING UPON THE EXECUTION, THE INTERPRETATION AND THE VALIDITY OF CONTRACTS, including the capacity of the parties to contract, are determined by the law of the place where the contract is made. (Union Nat. Bank v. Chapman, 614.)

2. CONFLICT OF LAWS.—ALL MATTERS CONNECTED WITH THE PERFORMANCE OF A CONTRACT, including presentation, notice, and demand, are regulated by the law of the place where the contract, by its terms, is to be performed. (Union Nat. Bank v. Chapman, 614.)

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See Husband and Wife, 3-6.

CONSPIRACY.

See Combination in Business.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—STATUTES VALID IN PART.—If parts of a statute which are constitutional and parts which are unconstitutional are wholly independent of one another, the unconstitutional parts may be rejected and the constitutional parts enforced, but if all of the different parts of the statute are so intimately connected with and dependent upon one another as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all of the provisions thus dependent upon each other must fail. (McArdle v. Mayor etc. of Jersey City, 496.)

2. TITLE OF STATUTES, WHEN SUFFICIENT.—Under the title of "An act relating to the title of real property," a statute may be enacted specifying the time within which suits must be brought to determine conflicting claims to the title to real property. (Power v. Kitching, 691.)

3. CONSTITUTIONAL LAW—TITLE OF ACT—COGNATE MATTER.—If a statute is entitled "an act relative to the time of election and appointment and terms of office of officers elected or appointed in cities," and it changes the time of year for the holding of such elections, a provision extending the terms of office of the several city officials until successors can be elected at the election provided for in the statute is cognate to the title of the statute, and may be constitutionally included in the act. (Boorum v. Connelly, 469.)

4. CONSTITUTIONAL LAW—TITLE OF ACT.—A constitutional requirement that the object of every law shall be expressed in its title is satisfied when the title fairly indicates the general object of the statute, although it does not indicate the means or method of attaining that object, and it is only in a plain case that a statute may be declared void because its title does not express the object of the law. (Boorum v. Connelly, 469.)

5. CONSTITUTIONAL LAW—STATUTES—COGNATE MATTER.—If the subject of legislation is of a general character, all matters reasonably connected with it, and appropriate to accomplish or facilitate the object of the act, may be embraced in it without infringing the constitutional interdict prohibiting the intermixing of such things as have no proper relation to each other. (Boorum v. Connelly, 469.)

6. TITLE OF STATUTES.—THE CONSTITUTIONAL RESTRICTIONS respecting the title of statutes are construed liberally. Generality of title is not fatal. (Power v. Kitching, 691.)

7. POLICE POWER—PREVENT FRAUD.—Legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common

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use, and thus imposing upon consumers or purchasers, is valid. (People v. Biesecker, 534.)

8. POLICE POWER.—THE LEGISLATURE CANNOT FORBID or wholly prevent the sale of a wholesome article of food. (People v. Biesecker, 534.)

9. CONSTITUTIONAL LAW.—AN ENACTMENT OF A STANDARD OF PURITY OF AN ARTICLE OF FOOD, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome. (People v. Biesecker, 534.)

10. CONSTITUTIONAL LAW.—A STATUTE WHICH PROHIBITS THE PRESERVATION OF DAIRY PRODUCTS except by the use of salt, sugar, and spirituous liquors, and prohibits their sale, no matter how harmless the ingredients used may be, or how efficiently they attain their purpose, is an improper exercise of the police power. (People v. Biesecker, 534.)

11. CONSTITUTIONAL LAW—PRESERVNG FOOD.—A STATUTE IS NOT A VALID REGULATION which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. (People v. Biesecker, 534.)

12. POLICE POWER—IMPURE FOOD.—IN THE INTEREST OF PUBLIC HEALTH the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale. (People v. Biesecker, 534.)

13. CONSTITUTIONAL LAW—EFFECT OF ADJUDICATION OF NATIONAL QUESTION.—Whenever a national question is involved, the national constitution as construed by the supreme court of the United States is the supreme law of the land, and as such must be respected and obeyed by the state courts. (State v. Warner, 422.)

14. CONSTITUTIONAL LAW.—NO DISCRIMINATION IS MADE AGAINST NEGROES by the laws of Missouri, and they are afforded every protection to life and liberty which white persons have. (State v. Warner, 422.)

15. CONSTITUTIONAL LAW.—IF CONSTITUTIONAL RIGHTS COME IN CONFLICT WITH STATUTES, the former tolls the latter, and if a constitutional right has no statute specially adapted to enforce it by its own inherent potency, it enforces itself. (State v. Warner, 422.)

16. CONSTITUTIONAL LAW—MUNICIPAL REGULATION.—Rules for determining the constitutionality of statutes relating to the internal affairs of municipalities apply only to statutory classifications adopted by the legislature to answer some purpose not within the constitutional classifications of counties, cities, boroughs, towns, townships, and villages. (Boorum v. Connelly, 469.)

17. CONSTITUTIONAL LAW—MUNICIPAL CLASSIFICATION.—There are two sorts of classifications known to the law for the purpose of determining whether a law regulating the internal affairs of municipalities is general or special: 1. The constitutional classification of municipalites into counties, cities, boroughs, towns, townships, and villages; and 2. The statutory or subclassifications of territory for the purpose of legislation, which are less than, or not included in, the constitutional classifications. (Boorum v. Connelly, 469.)

18. CONSTITUTIONAL LAWS.—GENERAL LAWS, as contradistinguished from special or local laws, are laws that embrace a class of subjects or places, and do not omit any subject or place naturally belonging to such class. (Boorum v. Connelly, 469.)

19. CONSTITUTIONAL LAW—GENERAL LAWS.—A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is a general, and not a special or local, law, without regard to the consideration that within the state there happens to be but one individual of that class or one place where it produces effects. (Boorum v. Connelly, 469.)

20. CONSTITUTIONAL LAW—MUNICIPAL REGULATION—ELECTION OF OFFICERS.—A statute requiring that all officers to be elected at any municipal or charter election in any city within the state shall be voted for and elected on a certain day in each year is a general law and constitutional, although it applies only to cities and changes the time of holding such elections. (Boorum v. Connelly, 469.)

21. CONSTITUTIONAL LAW.—CLASSIFICATION ON THE BASIS OF POPULATION in statutes relating to the machinery and powers of municipal government is legitimate where population bears a reasonable relation to the necessities and proprieties of such government. (McArdle v. Mayor etc. of Jersey City, 496.)

22. CONSTITUTIONAL LAW.—CONSTITUTIONAL RIGHT TO VOTE AT ALL ELECTIONS is denied by a statute providing for a board of excise commissioners, consisting of four members, to be elected, two members at each annual election for the term of two years, but that no ballot shall contain the name of more than one candidate. (McArdle v. Mayor etc. of Jersey City, 496.)

23. CONSTITUTIONAL LAW—PRESENCE OF ACCUSED—RIGHT TO CHALLENGE GRAND JURY.—A person in jail accused of a felony awaiting the action of the grand jury has a constitutional right to be present at the impaneling of such jury, and to make challenges thereto on any grounds he may deem proper, and such right cannot be narrowed nor abridged by statutory enactment. It is immaterial that the grounds of challenge which he intended to set up are afterward adjudged to be insufficient. (State v. Warner, 422.)

24. CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO BE PRESENT.—The constitutional right of a person accused of crime to be present at all criminal proceedings against him includes the right to be present when the grand jury before whom he is accused is impaneled for the purpose of challenging it, and cannot be confined to the right to be present at his trial and to challenge the petit jury. (State v. Warner, 422.)

25. CONSTITUTIONAL LAW—CRIMINAL LAW.—A statute purporting to confer power upon the board of managers of a state reformatory to disregard the judgment of the trial court, and to ascertain and determine whether a prisoner has been properly sentenced to such reformatory, or whether he should not have been sentenced to the state prison, and to transfer to the latter prisoners sentenced to the state reformatory, is unconstitutional, as an attempt to confer judicial power upon an administrative board, and to imprison in the state prison without due process of law. (People v. Mallary, 212.)

26. CONSTITUTIONAL LAW.—IN ADMINISTERING THE CRIMINAL LAWS of the state there is no power outside the courts to authorize the punishment of persons for crime by confinement in the state prison, especially when the constitution expressly inhibits any person, or collection of persons, of one department of the government from exercising any power properly belonging to the others except as expressly permitted thereby. (People v. Mallary, 212.)

27. CONSTITUTIONAL LAW—HABITUAL CRIMINAL ACT. A statute imposing an increased punishment for an offense by reason of former convictions is constitutional. (Herndon v. Commonwealth, 303.)

See Habeas Corpus; Eminent Domain; Physicians and Surgeons; Taxation.

CONTRACTS.

1. CONTRACTS—CONSTRUCTION.—If the construction of a contract in writing is doubtful, and the parties thereto have given a construction to it by acting upon it in a certain manner, courts usually adopt that construction. (Mueller v. Northwestern University, 194.)

2. CONTRACTS—CONSTRUCTION.—If a particular use of a word becomes common, that use must be taken into consideration in construing a contract, regardless of whether its meaning can be found in any lexicon or not. (Ullman v. Chicago etc. Ry. Co., 949.)

3. CONTRACTS—RIGHT TO PROHIBIT ASSIGNMENT OF.—The parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him. (Mueller v. Northwestern University, 194.)

4. CONTRACT TO REFRAIN FROM BUSINESS.—WHERE A BARBER sells his business and contracts not to engage in such business in any manner in a certain town, he may subsequently be enjoined from carrying on such business, either as a proprietor or as an employé. (Pohlman v. Dawson, 249.)

5. CONTRACT—SUPPRESSING COMPETITION.—AN AGENT who is intrusted with money to buy property at a judicial sale, under an agreement, one object of which was to prevent competition at the sale, cannot, after the agreement is executed, refuse to account for a surplus in his hands, on the ground that the agreement was against public policy. (Hardy v. Jones, 223.)

See Conflict of Laws; Telegraph Companies.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

1. CORPORATIONS—POWER TO COMPEL INSPECTION OF BOOKS OF.—The inherent jurisdiction of a court of chancery to compel the production for inspection of books and papers, whether of an individual or corporation, is confined to cases where they are evidential in a cause pending in court, and cases arising under a bill filed for relief as well as discovery, or for discovery only, in aid of a prosecution or defense in litigation pending or contemplated. (Fuller v. Hollander & Co., 456.)

2. CORPORATIONS—POWER TO COMPEL INSPECTION OF BOOKS.—Under a statute empowering the court of chancery, the supreme court, or any justice thereof, upon proper cause shown, to summarily order any or all of the books of a foreign corporation to be forthwith brought into the state and kept therein for such time as may be designated in such order, the power granted can be exercised only when a condition arises wherein the judicial authority whose action is invoked can exercise control over such books for some lawful and useful purpose, and such condition constitutes proper cause for the exercise of the authority. (Fuller v. Hollander & Co., 456.)

3. CORPORATIONS—INSPECTION OF BOOKS.—MANDAMUS is the sole remedy of a stockholder wrongfully refused inspection of the books or papers of a corporation. (Fuller v. Hollander & Co., 456.)

4. CORPORATIONS—STOCKHOLDER'S LIABILITY—LIMITATIONS.—Where a cause of action against a corporation matures when it suspends business, and is barred in three years by the statute of limitations, an action against a stockholder is barred in the same length of time, although no action could be begun against the stockholder until one year after the bank had suspended business. (Pacific Elevator Co. v. Whitbeck, 229.)

5. CORPORATIONS.—A STOCKHOLDER'S LIABILITY TO THE CREDITORS OF A CORPORATION is contractual, though it is separate and collateral to the liability of the corporation. (Pacific Elevator Co. v. Whitbeck, 229.)

6. CORPORATIONS.—SINCE A STOCKHOLDER STANDS IN THE RELATION OF SURETY TO THE CORPORATION, HIS LIABILITY must cease when the liability of the corporation no longer exists. (Pacific Elevator Co. v. Whitbeck, 229.)

7. CORPORATIONS—EVIDENCE OF OWNERSHIP OF STOCK.—The appearance of a name on the books of a corporation as a stockholder is prima facie evidence that the holder of such name is the owner of the stock. (Sherwood v. Illinois etc. Sav. Bank, 183.)

8. CORPORATIONS—STOCKHOLDERS, WHO ARE—RIGHTS OF CREDITORS.—A creditor of an insolvent corporation is entitled to hold him liable as a stockholder who appears to be such upon the books. (Sherwood v. Illinois etc. Sav. Bank, 183.)

9. CORPORATIONS—TRUSTEE'S LIABILITY AS STOCKHOLDER.—One who stands upon the books of a corporation as a stockholder may be proceeded against to enforce the personal liability of stockholders for the debts of the corporation, although he in fact holds such stock as trustee. (Sherwood v. Illinois etc. Sav. Bank, 183.)

10. CORPORATIONS—TRUSTEE'S LIABILITY AS STOCKHOLDER.—One desiring to claim statutory protection exempting from liability as stockholder person holding stock as trustee or in a fiduciary relation must cause his representative character and the identity of the true owner to appear upon the records of the corporation. (Sherwood v. Illinois etc. Sav. Bank, 183.)

11. POWER OF ATTORNEY TO VOTE AND DEAL WITH STOCK—REVOCABILITY.—A power of attorney made by a stockholder to vote and deal with his stock, or sell and exchange it, conferring an interest, and by its terms irrevocable, cannot be revoked by the maker in the absence of a showing of illegal purpose in granting the power, or that it is in violation of statute or against public policy. (Chapman v. Bates, 459.)

12. CORPORATIONS.—POOLING OR COMBINING OF CORPORATE STOCK with an object to carry out a particular policy to promote the best interests of all the stockholders, is not necessarily illegal. (Chapman v. Bates, 459.)

13. CORPORATION.—BECOMING SURETY OF GUARANTOR for the contract or debt of another is not, ordinarily, within the implied powers of a corporation. (M. V. Monarch Co. v. Farmers' etc. Bank, 310.)

14. CORPORATION—COMMERCIAL PAPER.—As a general rule, a corporation has no power to guarantee commercial paper, unless the contract is reasonably necessary, or is usual in the conduct of its business. (M. V. Monarch Co. v. Farmers' etc. Bank, 310.)

15. CORPORATION'S LIABILITY FOR SERVICES OF PROMOTER.—A corporation is liable, by an implied contract, for such services rendered for the use of the corporation as are necessary to its formation, or may be necessary to be done by it, after its incorporation, in furtherance of its corporate business. (Farmers' Bank v. Smith, 341.)

16. FOREIGN CORPORATIONS.—UNDER THE NEW YORK CODE, AN ACTION cannot be maintained between two foreign corporations unless the cause of action arose within that state. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

17. CONSTITUTIONAL LAW—FOREIGN CORPORATIONS. A STATE HAS POWER TO PRESCRIBE, arbitrarily or from policy, limitations and conditions upon the exercise by foreign corporations of corporate rights within the state, whether upon the right to do business or upon the right to sue in the state courts. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

18. A FOREIGN CORPORATION IS NOT A CITIZEN OF THE STATE IN THE CONSTITUTIONAL SENSE; it has no extraterritorial existence, and what rights it may exercise in other jurisdictions are permitted upon the principle of comity. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

19. FOREIGN CORPORATIONS.—IT IS NOT AN UNREASONABLE EXERCISE OF POWER, FOR A STATE TO RESTRICT LITIGATION in its courts, between foreign corporations, to causes of local origin. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

COTENANCY.

COTENANCY—CONVERSION.—ONE COTENANT CANNOT USUALLY MAINTAIN REPLEVIN against his cotenant to recover possession of a chattel, nor conversion for its value, unless there has been a destruction of the property, or such a hostile appropriation thereof as to exclude or destroy the interest of the other tenant therein. (Gates v. Bowers, 530.)

See Partition.

CRIMINAL LAW.

1. CRIMINAL LAW—PRESENCE OF PRISONER.—An order of suspension entered on motion of the accused after trial, judgment, and sentence, does not vitiate such prior proceedings, although the order of suspension fails to show the presence of the prisoner in person at the time it was entered. (State v. Young, 846.)

2. IN MISDEMEANORS, ALL CONCERNED, IF GUILTY AT ALL, ARE PRINCIPALS. (State v. Stark, 251.)

3. MISDEMEANORS.—ONE WHO IS PRESENT, ADVISING, COUNSELING OR ENCOURAGING the commission of a misdemeanor, is equally guilty with those actually committing the offense. (State v. Stark, 251.)

4. HABITUAL CRIMINAL ACT—FORM OF VERDICT.—In a prosecution of a defendant, against whom are prior convictions, under a statute imposing heavier penalties for second and third offenses, a verdict is sufficient which, under the instructions of the court, is in effect a finding of the former convictions, though there is no express finding thereof. (Herndon v. Commonwealth, 306.)

5. HABITUAL CRIMINAL ACT—EFFECT OF PARDON.—The fact that a defendant was pardoned of the crime of which he was first convicted does not relieve him from liability for the increased penalty imposed by statute on a conviction. (Herndon v. Commonwealth, 308.)

See Constitutional Law, 23-27; Trial.

COURTESY.

See Marriage and Divorce, 5.

DAMAGES.

NEGLIGENCE — PERSONAL INJURY — MEASURE OF DAMAGE.—A person who is injured through the negligence of another is entitled to recover damages for mental suffering and such impairment of physical abilities as he is reasonably certain to endure as the result of his injury. An instruction limiting his recovery to such suffering "as he will be compelled to undergo" and such damages "as he will actually sustain" is not prejudicial to the defendant. (Yerkes v. Northern Pac. Ry. Co., 961.)

See Death; Sales, 2, 3.

DEATH.

ALIENS—RIGHT TO SUE.—A nonresident alien mother of a minor killed by the negligence of another may maintain an action against the wrongdoer to recover for the death. (Kellyville Coal Co. v. Petraytis, 191.)

DEEDS.

See Acknowledgment; Husband and Wife; Insane Persons.

DEMURRAGE.

See Carriers, 13-16.

DIVORCE.

See Marriage and Divorce.

DOMICILE.

DOMICILE—CHANGE OF—DECLARATIONS.—Whether going from one state to another effects a change of domicile is largely a matter of intent, and any declarations so connected with the act of going as to be regarded as qualifying or characterizing the act are admissible in evidence as tending to establish the intent actuating the party at the time. (Matzenbaugh v. People, 134.)

DRUGGISTS.

1. DRUGGISTS—CARE REQUIRED OF.—APOTHECARIES, druggists and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines are required to be extraordinarily skillful and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds. (Peters v. Johnson, Jackson & Co., 909.)

2. SALE OF POISONOUS DRUGS—PRIVITY OF CONTRACT. A merchant or druggist who, through mistake, negligence, or incompetency, sells to one person a poisonous substance for medicine, when a harmless medicine is called for, when injury results to a third person and stranger to the sale, from the taking of such poisonous substance without negligence, the seller is liable to such third person, though there is no privity of contract between them. (Peters v. Johnson, Jackson & Co., 909.)

EJECTMENT.

1. EJECTMENT—SECONDARY EVIDENCE.—In an action to recover real property, copies of a writ and execution and the officer's return thereon are admissible to show the demandant's title. (Frazee v. Nelson, 391.)

2. EJECTMENT—PROOF OF TITLE OBTAINED BY EXECUTION SALE.—If the demandant in an action to recover real property claims title under an execution sale, he must prove a valid judgment. The recital of the judgment in the execution is not the best or proper evidence thereof as against a tenant who is a stranger to the execution proceedings. (Frazee v. Nelson, 391.)

ELECTIONS.

See Constitutional Law, 20-22.

ELEVATORS.

ELEVATOR OWNER—LIABILITY AS CARRIER.—One who maintains a passenger elevator in an office building is not a common carrier within a statute giving a remedy for loss of life through the negligence of "common carriers of passengers." (Seaver v. Bradley, 384.)

EMBEZZLEMENT.

EMBEZZLEMENT.—IF A PERSON HONESTLY RECEIVES THE POSSESSION OF THE GOODS, chattels or money of another upon any trust, express or implied, and, after receiving them, fraudulently converts them to his own use, the offense is embezzlement and not larceny. (People v. Miller, 546.)

See Agency, 2.

EMINENT DOMAIN.

1. CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.—LEGISLATIVE DETERMINATION that a particular use shall be deemed public so as to authorize the taking of private property therefor, is binding on any judicial tribunal, if there is any reasonable ground to support it. (Chicago etc. Ry. Co. v. Morehouse, 918.)

2. CONSTITUTIONAL LAW—EMINENT DOMAIN—LEGISLATIVE DECLARATION.—A statute authorizing railroad companies to condemn land for branches and spur tracks to any "mill, elevator, store, house, or other industry or enterprise" is valid and constitutional, and the taking of land for a spur track, to be constructed to connect with a single industry, is a taking for a public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination. (Chicago etc. Ry. Co. v. Morehouse, 918.)

EQUITY.

1. EQUITY DOES NOT GIVE A PRIVATE RIGHT OF ACTION to an individual for the doing of a wrongful act, merely because a statute has denounced the act as a crime. (Downes v. Bennett, 256.)

2. EQUITY—LIABILITY FOR WRONGFUL ACT.—If one of two innocent persons must suffer for the wrongful act of a third, the loss must be borne by him who put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong. (Franklin Fire Ins. Co. v. Bradford, 770.)

ESCAPE.

VOLUNTARY ESCAPE.—The doctrine of voluntary escape has no application to criminal cases and commitments to jail or prison as a punishment for crime. (People v. Mallary, 212.)

ESTATE OF DECEDENT.

See Executors and Administrators.

EVIDENCE.

1. EVIDENCE—DECLARATIONS OF AGENT AS EVIDENCE. Declarations of an agent within the scope of his authority, and relating to a transaction then being performed by him as agent, are competent evidence against his principal. (Matzenbaugh v. People, 134.)

2. EVIDENCE—DECLARATION.—If, under the evidence, it is uncertain whether a declaration was made in the hearing of the accused, it is not error to allow proof of the declaration and instruct the jury to disregard it if they believe the accused did not hear it. (Knight v. State, 17.)

3. EVIDENCE.—DECLARATIONS AGAINST HIS INTEREST made by a party to the record are always admissible in evidence, and, when the offer is to prove what he testified to in certain legal proceedings, it is an offer to prove conclusively what his admission was. (Stevenson v. Ebervale Coal Co., 805.)

4. EVIDENCE—DECLARATIONS—RES GESTAE.—No fixed time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction. (Keefer v. Pacific Mutual Life Ins. Co., 822.)

5. EVIDENCE—RES GESTAE — DECLARATIONS.—Declarations of a deceased as to an alleged fall causing death are not ad-

missible as part of the res gestae, if he must have arisen after the fall and returned over a distance of several hundred feet, covering a period of from fifteen to thirty minutes, before he came walking deliberately back to the witnesses who are offered to prove his declarations. (Keefer v. Pacific Mutual Life Ins. Co., 822.)

6. EVIDENCE.—AN ADMISSION OF AN INCRIMINATING NATURE BY A HUSBAND to his wife in response to something said by her to him may be testified to by any stranger who overhears the conversation. (Knight v. State, 17.)

7. EVIDENCE.—A CONVERSATION BETWEEN A HUSBAND AND WIFE, though intended to be confidential, may be proved by one who overhears it. (Knight v. State, 17.)

8. SECONDARY EVIDENCE.—A COPY FROM THE REGISTRY OF DEEDS is sufficient evidence of the execution of the deed of which it is a copy. (Frazee v. Nelson, 391.)

9. JUDICIAL NOTICE—ENACTMENT OF STATUTE.—The appellate court will take judicial notice of the enactment of a public statute relating to the subject matter of a suit while an appeal is pending without a formal supplemental plea. (Vance v. Rankin, 178.)

See Homicide, 7, 8; Notary's Seal; Trial; Witnesses.

EXECUTIONS.

1. EXECUTION SALE—ADJOURNMENT.—If an officer's return sets out that adjournments of an execution sale were made by direction of the plaintiff's attorney, this court cannot say that such adjournments were not for "good cause." (Frazee v. Nelson, 391.)

2. EXECUTION SALE—ABANDONMENT OF PART OF LEVY.—If an execution is levied on several lots, but the levy is abandoned as to all except the one sold, the fact that notice of such abandonment was not given does not prejudice the debtor. (Frazee v. Nelson, 391.)

3. EXECUTION SALE—ENCUMBRANCES.—IT NEED NOT APPEAR in the officer's return or deed whether land sold under execution is free from, or subject to, encumbrances, when the sale is of all the debtor's right, title, and interest. (Frazee v. Nelson, 391.)

4. EXECUTION SALE.—IF OFFICER'S DEED at an execution sale conveys all the interest of the debtor "attached as aforesaid," whereas it does not appear from the return or deed that there was an attachment, the words quoted refer to the interest spoken of earlier in the deed as seized on execution. (Frazee v. Nelson, 391.)

5. THE EXECUTION OF A JUDGMENT MAY NOT BE ENJOINED simply because no sufficient summons was served, unless it is shown that the defendant had a defense, in whole or in part, to the judgment rendered. (Tootle v. Ellis, 246.)

EXECUTORS AND ADMINISTRATORS.

1. AN EXECUTOR MAY WITHDRAW PROPERTY OFFERED FOR SALE at public outcry after bids are received and cried, but before it is knocked off to the highest bidder. (Tillman v. Dunman, 28.)

2. THE HIGHEST BIDDER AT AN EXECUTOR'S SALE ACQUIRES NO RIGHT to compel a conveyance of the property by

the executors if the property is withdrawn before being knocked off. And he has no right to inquire into the motives of the executors in withdrawing the property, nor can he make the question that their act is against public policy. (Tillman v. Dunman, 28.)

3. THE STATUTE OF LIMITATIONS WILL RUN UPON THE CLAIM OF A CREDITOR AGAINST THE ESTATE OF A DECEDENT, although no administrator has been appointed. (Black v. Elliott, 239.)

4. ESTATES OF DECEDENTS—SUBJECTING REAL PROPERTY TO PAYMENT OF DEBTS.—In any proceeding, either in the probate court or in equity for the purpose of subjecting the lands of an heir or devisee to the payment of a claim against the ancestor, such persons may contest the legality of such claim, regardless of whether it has been duly allowed by the probate court as a claim against the estate. (Black v. Elliott, 239.)

5. ESTATES OF DECEDENTS.—AT COMMON LAW, IF A CREDITOR OF A DECEDENT DESIRED TO SUBJECT SUCH DECEDENT'S REAL PROPERTY to the payment of his claim, he was required to bring his action directly against the heir for that purpose. (Black v. Elliott, 239.)

6. ESTATES OF DECEDENTS.—THE ALLOWANCE OF A CREDITOR'S CLAIM AGAINST A DECEDENT'S ESTATE by the probate court is, so far as the personal estate is concerned, binding upon the administrator and on such estate. (Black v. Elliott, 239.)

7. ESTATES OF DECEDENTS.—THE TITLE TO REAL ESTATE, UPON A DECEDENT'S DEATH, descends at once to the heir, who is entitled to the possession thereof, no right or title therein going to the administrator. (Black v. Elliott, 239.)

8. ESTATES OF DECEDENTS.—UNDER THE KANSAS STATUTES, AN ADMINISTRATOR TAKES TITLE TO THE PERSONAL ESTATE, is entitled to its possession, and may maintain any possessory action to enforce such right. (Black v. Elliott, 239.)

EXEMPTIONS.

1. EXEMPTIONS.—A HORSE USED IN DRAWING A DRAY and not worth over forty dollars, comes within the term "farm horse," as used in the Georgia exemption statute, notwithstanding his employment may be urban, rather than rural, in character. (Kirksey v. Rowe, 65.)

2. EXEMPTIONS.—A HALF INTEREST IN A TWO-HORSE WAGON cannot be exempted as a "one-horse wagon." (Kirksey v. Rowe, 65.)

3. EXEMPTION OF TOOLS.—A SET OF HARNESS does not fall within the words "common tools of trade," as used in an exemption statute. (Kirksey v. Rowe, 65.)

4. EXEMPTIONS—HEAD OF FAMILY.—A WIFE cannot, on the mere fact of her marital relation, base a claim of exemption. But she may assert such claim when conditions cast upon her the rights and responsibilities appertaining to the headship of a family. (Ness v. Jones, 755.)

5. EXEMPTIONS—HUSBAND AS HEAD OF FAMILY.—IF A WIFE, with slight assistance from her husband, carries on their home farm, and supplies the necessaries for the family, while he engages in business, and is not disabled or unwilling to labor to support the family, he is the head of the family, within the exemption laws, as to the crops. (Ness v. Jones, 755.)

6. EXEMPTIONS.—THE LAW TOLERATES BUT ONE HEAD and one exemption for one family. (Ness v. Jones, 755.)

7. EXEMPTIONS—HEAD OF FAMILY.—THE HUSBAND, not the wife, is primarily the head of the family. (Ness v. Jones, 755.)

EXPERT TESTIMONY.

See Witnesses, 2, 3.

FALSE PRETENSES.

1. FALSE PRETENSES, IN CRIMINAL LAW, AS A MEANS OF OBTAINING THE TITLE OR POSSESSION OF PERSONAL PROPERTY, import an intentional false statement concerning a material matter of fact, upon which the complainant relied in parting with the property or in delivering the possession. (People v. Miller, 546.)

2. FALSE PRETENSES.—IF THE POSSESSION OF PROPERTY IS OBTAINED BY FRAUD, and the owner intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as in law are false pretenses. (People v. Miller, 546.)

3. A CRIMINAL CHARGE OF OBTAINING MONEY BY FALSE PRETENSES cannot be based upon fraudulent statements wholly promissory in their nature, and containing no representation as to any existing fact. (People v. Miller, 546.)

FENCES.

FENCES—LIABILITY FOR THEIR CONDITION.—WHILE BARBED WIRE may lawfully be used for fencing, conditions may exist which render its use dangerous and the persons responsible for its construction or condition liable for resulting damages. (Kuhnert v. Angell, 675.)

FOODS.

See Constitutional Law, 7-12.

FORGERY.

FORGERY is the fraudulent making of some writing to the prejudice of another's right. (Franklin Fire Ins. Co. v. Bradford, 770.)

See Agency, 4.

FRAUD.

1. FRAUD CANNOT BE DEDUCED or inferred from that which the law pronounces honest. (Shibler v. Hartley, 811.)

2. FRAUD A QUESTION FOR COURT.—If the evidence of fraudulent intent is contained in a written instrument, it is the duty of the court to declare its legal effect. (Bergman v. Jones, 739.)

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—RIGHT TO PREFER CREDITORS.—A creditor may take a judgment, conveyance, or payment in any form to secure an actual debt, and the transaction is valid against other creditors, although he knows and intends that the effect will be to postpone them, and though he acts in aid of that intent as well as to protect himself. Such transaction cannot be impeached without a fraudulent intent, which cannot be inferred from the mere preference given, when there is in fact an actual debt. (Shibler v. Hartley, 811.)

2. FRAUDULENT CONVEYANCES—PREFERENCE OF CREDITOR.—A debtor may lawfully prefer a creditor by any form of payment, and he may hasten the collection of the debt secured by judgment by confession, and by waiving inquisition, stay of execution, or appeal, either at the time the judgment is confessed or afterward. The fact that he receives a consideration therefor to enable the creditor to better secure or facilitate the collection of the claim is not alone a ground for the inference of fraud. (Shibler v. Hartley, 811.)

See Chattel Mortgages, 6-8.

GAS COMPANIES.

1. NEGLIGENCE.—IN THE CASE OF GAS COMPANIES, the material and workmanship of the pipes and fittings must be of the highest character, and every precaution which is within the bounds of reason must be taken to guard against deterioration, misplacement, or leakage. (Heh v. Consolidated Gas Co., 819.)

2. NEGLIGENCE.—HIGHER DEGREES OF CARE AND VIGILANCE are required in dealing with a dangerous agency, such as gas, than in the ordinary affairs of life or business, and, while no absolute standard of duty in dealing with such agencies can be prescribed, every reasonable precaution suggested by experience and the known dangers of the subject must be taken. (Heh v. Consolidated Gas Co., 819.)

GIFTS.

1. GIFT—REVOCATION.—ONE WHO PLACES MONEY WITH ANOTHER to deliver to third persons as a gift may, before the delivery and acceptance thereof, revoke the agency he has created, and terminate the right to hold the money for the purpose of distributing it to the intended donees. (Smith v. Peacock, 53.)

2. GIFT—WHEN INCOMPLETE—REVOCATION.—If one delivers money to another with instructions to give designated amounts to certain persons, and to invest a part of the balance in lands and have the titles thereto made to minor children of the person to whom the money is delivered, the gift to the minors, as to any portion of such balance not so invested, is incomplete, and the owner may reassert title thereto. (Smith v. Peacock, 53.)

HABEAS CORPUS.

1. HABEAS CORPUS WILL NOT LIE to test the validity of the statute under which a person is convicted of a crime. (People v. Mallary, 212.)

2. HABEAS CORPUS WILL LIE to test the validity of a statute having no reference to the conviction, but only to the detention of the prisoner after his commitment. (People v. Mallary, 212.)

3. HABEAS CORPUS WILL LIE WHERE, although the original imprisonment was lawful, yet by some subsequent act, omission, or event the prisoner has become entitled to his discharge. (People v. Mallary, 212.)

4. HABEAS CORPUS—CONSTITUTIONAL LAW.—Prisoners are not entitled to their discharge on habeas corpus if they have been returned to the institution to which they were at first lawfully committed, and are being held there when the petition is presented, although they may have been before that time illegally transferred to another institution temporarily under an unconstitutional statute. (People v. Mallary, 212.)

HEAD OF FAMILY.

See Exemptions.

HOMESTEADS.

HOMESTEAD—STATUTE OF LIMITATIONS.—A MORTGAGE on a homestead, given to secure a note executed by a husband and wife, may, after the husband's death, and after the expiration of a period of time equal to the statute of limitations, be enforced against the entire homestead, and against the interests of the widow and minor children, where the debt has been kept alive by payments made by the wife. (Perry v. Horack, 225.)

See Exemptions.

HOMICIDE.

1. HOMICIDE—KILLING BYSTANDER.—MALICIOUSLY TO FIRE A GUN into a crowd, regardless of consequences, is murder in the first degree, if death results to an innocent bystander therefrom. (State v. Young, 846.)

2. HOMICIDE IN DEFENSE OF PROPERTY.—In case of a controversy over land, life can be taken only in self-defense or in the necessary defense of others. It cannot be taken to prevent a trespass. (Utterback v. Commonwealth, 328.)

3. HOMICIDE—DEFENSE OF PROPERTY.—THE LAW OF DEFENSE OF HABITATION is not applicable to the protection of property. (Utterback v. Commonwealth, 328.)

4. HOMICIDE IN DEFENSE OF SON.—If one fires a fatal shot in defense of his son, he is excusable or not according as the son would be innocent or guilty had he fired the shot in his own defense. (Utterback v. Commonwealth, 328.)

5. HOMICIDE — SELF-DEFENSE — INTERVENTION OF THIRD PERSON.—If, after the commencement of a combat over land, the defendant's son appeared on the scene, and on a resumption of the shooting the fatal shot was fired in his defense, the court should instruct the jury that if the defendant began the difficulty, or if he and the deceased went upon the premises determined on a conflict, and the conflict was by mutual consent, the defendant could not rely on the right of self-defense, unless he withdrew from the conflict and afterward re-engaged in it only in defense of his son. (Utterback v. Commonwealth, 328.)

6. HOMICIDE—EVIDENCE.—If a homicide results in a controversy over the defendant's right to a road, evidence of facts on which this right is based is admissible to show his good faith and

assist the jury in determining the punishment if he is guilty. (Utterback v. Commonwealth, 328.)

7. HOMICIDE—THREATS OF ACCESSARY AS EVIDENCE. Declarations by a person jointly arrested and indicted with the accused for the murder of a police officer, made one year prior to the arrest, that he would get even with the police of the city in which the arrest was made, if it took twenty years, are inadmissible in evidence against the accused, in the absence of proof that the deceased was a policeman when the declarations were made, or that the accused knew that he was a policeman at any time, or that the accused took any part in the threats or declarations, or that any conspiracy existed to commit the homicide. (State v. Weaver, 406.)

8. HOMICIDE—EVIDENCE—ATTEMPT OF CO-INDICTEES TO BREAK JAIL.—If several persons are jointly indicted for a murder, it is error on the trial of one of them to admit evidence that his co-indictees had attempted to break jail, in which attempt he took no part, and it is also error to give an instruction relative to the attempt of the accused to break jail, founded on such evidence. (State v. Weaver, 406.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—WIFE'S FUNDS—PRESUMPTION.—Money of a wife received by her husband and with her knowledge and consent invested by him in land in his own name, is prima facie a gift from her to him. (Crumrine v. Crumrine, 859.)

2. MARRIED WOMEN—CONVEYANCES BY.—Under statutes providing that real estate owned by a married woman shall be her separate property, and vesting her with power to transact business on her own account, and to contract as if she were a feme sole, she may convey the legal title to her property by trust deed without her husband joining therein. (Farmers' Exch. Bank v. Hageluken, 434.)

3. CONFLICT OF LAWS.—THE CAPACITY OF A MARRIED WOMAN TO CONTRACT must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of its execution, clearly understood and intended that it should be governed by the laws of another state. (Union Nat. Bank v. Chapman, 614.)

4. WIFE'S CONTRACT WITH HUSBAND—CONFLICT OF LAW.—A contract between a husband and wife made in Kentucky, in which state they are domiciled and under whose laws she is incompetent to make such contract, whereby he conveys land to her in Virginia and she assumes a debt of his there payable, cannot be enforced against her in Kentucky, though it may be valid in Virginia. (Brown v. Dalton, 325.)

5. CONTRACTS OF MARRIED WOMEN, if valid in the state where made, may be enforced against them in another state, though, if originally made in the latter, they would be void. (Thompson v. Taylor, 485.)

6. MARRIED WOMAN'S CONTRACT—CONFLICT OF LAWS. An accommodation note made and delivered by a married woman to her husband in a state where they are domiciled, and by him taken to another state, and there indorsed and delivered by him in exchange for other notes of similar character, is a contract made in the latter state, and the capacity of the wife to bind herself by a

contract of suretyship is to be determined by the law of that state. (Thompson v. Taylor, 485.)

INFANTS.

1. AN INFANT MAY MAINTAIN AN ACTION FOR SLANDER by his next friend. (Hurst v. Goodwin, 43.)

2. AN INFANT MAY MAINTAIN AN ACTION FOR DAMAGES on account of any tort resulting in damages to him, whether the tortious act affects the parent or not. (Hurst v. Goodwin, 43.)

INHERITANCE TAX.

See Taxation.

INJUNCTIONS.

See Boycott.

INNKEEPERS.

1. AN INNKEEPER IS BOUND TO EXTRAORDINARY DILIGENCE in preserving the property of his guests intrusted to his care. (Carhart v. Wainman, 45.)

2. INNKEEPER — LIABILITY FOR BAGGAGE. — A guest makes out a prima facie liability against an innkeeper when he shows the delivery of his railroad baggage-check to the innkeeper's servant, within the scope of whose employment is the getting and delivering of baggage to guests, and that the innkeeper refuses to deliver to him the baggage or the check. (Carhart v. Wainman, 45.)

3. INNKEEPER.—THE DELIVERY OF A BAGGAGE-CHECK to an innkeeper by a guest is prima facie equivalent to a delivery of the baggage. (Carhart v. Wainman, 45.)

4. AN INNKEEPER IS BOUND BY THE ACTIONS OF HIS SERVANTS within the scope of their employment. (Carhart v. Wainman, 45.)

See Attorney's Fees.

INSANE PERSONS.

1. INSANE PERSON, DEED OF.—AN INSTRUCTION to the jury that if the grantees in a deed have no knowledge of the insanity of the grantor, the deed should be sustained notwithstanding her mental incapacity, is erroneous. (Woolley v. Gaines, 22.)

2. INSANE PERSONS.—IGNORANCE BY ONE PARTY to a contract that the other party was insane when it was executed does not affect the validity of the instrument. (Woolley v. Gaines, 22.)

INSTRUCTIONS.

1. TRIAL—INSTRUCTIONS.—An erroneous instruction on a given subject is not cured by the fact that the law is correctly stated in another instruction. (Yerkes v. Northern Pac. Ry. Co., 961.)

2. AN INSTRUCTION ON THE LAW OF ALIBI, though there is no occasion for it, is not ground for a new trial, if the accused is not thereby prejudiced. (Knight v. State, 17.)

3. JURY TRIAL.—AN INSTRUCTION ON THE LAW OF CONFESSIONS should be refused if there is no proof of any confession. (Knight v. State, 17.)

4. JURY TRIAL.—AN INSTRUCTION ON THE LAW OF MANSLAUGHTER is properly refused, if the evidence discloses that the accused is guilty of no less a crime than murder. (Knight v. State, 17.)

5. JURY TRIAL.—IN CHARGING THE JURY ON A STATEMENT OF THE ACCUSED, the court should not say "that statement is in no sense binding upon you"; but, if he does, this is not ground for a new trial, if it appears that they understand how they are authorized by law to use the statement. (Knight v. State, 17.)

INSURANCE.

1. JUDICIAL SALES—INSURANCE.—A CONTRACT OF INSURANCE upon property sold at a foreclosure sale between the purchaser and an insurance company is a personal contract of indemnity between such purchaser and the company alone, which does not inure to the benefit of the party entitled to redeem, and the purchaser, having collected the insurance money after the property has been destroyed by fire, is under no obligation to account for it to such redemptioner. (Deming Investment Co. v. Dickerman, 265.)

2. INSURANCE—ASSIGNMENT—RIGHTS OF ASSIGNEE.—If an insurance policy is assigned with the consent of the insurer, thereby vesting in the assignee the whole beneficial interest therein, and rendering it necessary for the latter to make the payments essential to keep the policy alive, all notices required to be given to the owner of the policy must, after such assignment, be given to the assignee. (McQuillan v. Mutual Reserve etc. Assn., 986.)

3. INSURANCE — ASSIGNMENT — NOTICE OF DELINQUENCY.—If the assignee of an insurance policy, holding the whole beneficial interest therein, allows it to lapse for failure to pay an assessment when due, and thereafter makes payment thereof, he is not affected by any condition relating to the life of the policy, notice of which is not brought home to him by the insurer who retains the money; notice to the assignor is not sufficient. (McQuillan v. Mutual Reserve etc. Assn., 986.)

4. INSURANCE—RESTRAINTS ON ASSIGNMENTS.—An insurance company may, by contract, place such restraints upon the assignment of its policies as it sees fit, not inconsistent with its own or some other law. It may thus limit its liability to the amount due the assignee from the assignor at the time of his death, and payments made by the former to keep the policy alive. (McQuillan v. Mutual Reserve etc. Assn., 986.)

5. INSURANCE—WAIVER OF FORFEITURE.—Retention by the insurer for an unreasonable time of money paid on an overdue assessment after a forfeiture of the policy has occurred to the knowledge of the insurer, without notifying the insured that any condition is affixed to such retention, notwithstanding a special request accompanying the money for an immediate return of evidence indicating that it has been received and applied for the purpose for which it is sent, constitutes a waiver of the forfeiture. (McQuillan v. Mutual Reserve etc. Assn., 986.)

6. INSURANCE—WAIVER OF FORFEITURE.—The retention, without condition, of money paid to an insurance company for an installment due upon one of its policies, with knowledge of facts rendering the policy void, ratifies and affirms it as a subsisting obligation. (McQuillan v. Mutual Reserve etc. Assn., 986.)

7. INSURANCE—WAIVER OF FORFEITURE.—Retention by an insurance company of an overdue assessment for a reasonable

time for the purpose of ascertaining whether the facts warrant a reinstatement of the forfeited policy under the company's by-laws, and to enable the insured to comply with conditions precedent to such reinstatement, does not waive the forfeiture caused by the payment of the overdue assessment. (McQuillan v. Mutual Reserve etc. Assn., 986.)

8. INSURANCE, LIFE.—THE MEDICAL EXAMINER IS THE AGENT OF THE INSURER in making an examination and taking down and recording the answers. His knowledge thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which is estopped from taking advantage of what it thus knew and what it had thus done when it issued the policy and accepted the premiums. (Sternaman v. Metropolitan Life Ins. Co., 625.)

9. AN INSURANCE CORPORATION IS ESTOPPED FROM RELYING ON AN AGREEMENT in an application for life insurance "that no information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person shall be binding on the company, or shall modify or alter the declarations and warranties made therein," if it issues a policy with knowledge of facts not stated in such application. (Sternaman v. Metropolitan Life Ins. Co., 625.)

10. INSURANCE, LIFE—WARRANTY, WHEN NOT A DEFENSE.—A warranty contained in an application for life insurance that the answers of the applicant are true and that they are correctly recorded, cannot relieve the insurer from liability, if, when he issues the policy, he knew, through his medical examiner, that the answers as recorded were not literally true, that the answers as given were not correctly recorded and that this occurred through no fault of the assured. (Sternaman v. Metropolitan Life Ins. Co., 625.)

11. INSURANCE—NEGLIGENCE OF AGENT.—SOUND POLICY PROHIBITS AN INSURER FROM STIPULATING for immunity from the consequences of his own negligence, or, what is the same thing, the negligence of his agent or medical examiner. (Sternaman v. Metropolitan Life Ins. Co., 625.)

12. INSURANCE, LIFE—AGREEMENT THAT AN AGENT OF THE INSURER SHALL BE THE AGENT OF THE ASSURED.—IF A MEDICAL EXAMINER is selected and paid by the insurer, who insists upon making such selection for himself, and the assured has nothing to do with such medical examiner except to submit to his examination and answer his questions, a stipulation in the application for insurance that the examiner shall be deemed the agent of the applicant is in contradiction to known facts, and cannot estop a beneficiary from proving that such examiner was the agent of the insurer only, and as such wrote the answers in the application, and, in so doing, did not correctly state the answers in fact made by the applicant. (Sternaman v. Metropolitan Life Ins. Co., 625.)

13. INSURANCE, LIFE—DEATH FROM EXTERNAL, VIOLENT, AND ACCIDENTAL CAUSE.—Evidence that the insured, a man in apparent good health, with no premonitory symptoms of serious disease, left his home for a walk, came back in half an hour with a bruise on his right temple and scratches on his face, saying he had fallen on loose stones in the path, complained of pain in his head, shortly lapsed into unconsciousness, and remained

in that condition two days until he died, that no one saw the alleged fall, that his attending physician was unable to state with any certainty the cause of death, but that there were present symptoms of uraemic poisoning, is wholly insufficient to support a finding that death resulted from external, violent, and accidental cause. (Keefer v. Pacific Mutual Life Ins. Co., 822.)

14. INSURANCE, ACCIDENT—UNNECESSARY EXPOSURE TO DANGER.—In the absence of circumstances of peril, a person who places his person in front of the muzzle of his gun, loaded and cocked, as he reaches for it to draw it toward him through a fence, "unnecessarily exposes himself to danger," within the meaning of an accident insurance policy excluding from the risk disability arising from such exposure. (Sargent v. Central Accident Ins. Co., 946.)

See Benefit Societies.

INTEREST.

1. INTEREST.—COMPLAINANT IN A BILL OF INTERPLEADER cannot be charged interest when the defendants claim the fund and it is withheld at the request of one of the defendants, and the complainant is not guilty of negligence causing the delay in payment. (Mueller v. Northwestern University, 194.)

2. INTEREST.—ONE RECOVERING A JUDGMENT for the conversion of bonds is entitled to the ordinary rate of interest thereon from the date of the writ. (Scollans v. Rollins, 386.)

INTOXICATING LIQUORS.

SALE OF LIQUOR FOR UNLAWFUL RESALE IN ANOTHER STATE.—A seller of liquors who rightly supposes that the buyer intends to resell them unlawfully without the state, but who is, and is known by the buyer to be, indifferent to what he does with the goods, and to have no other purpose than to sell them in the state in the usual course of business, may recover the price of the liquors. (Graves v. Johnson, 355.)

JUDGMENTS.

1. JUDGMENTS—FINAL DECREE.—If findings of fact on any material matter involved in the case are left open for the future determination of the court, the decree is not final until that determination is included therein. (Young v. Young, 440.)

2. VOID JUDGMENTS—INJUNCTION.—THE FAILURE TO INDORSE ON A SUMMONS, as required by statute, the amount for which judgment would be taken if the defendant failed to answer, does not make the judgment rendered in such action void, so that its enforcement can be enjoined. (Tootle v. Ellis, 246.)

3. A JUDGMENT, AS A DEBT OF RECORD, IS A CONTRACT OBLIGATION of the highest nature. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

4. A JUDGMENT IS NOT A CONTRACT in the sense of any engagement of the parties with each other, since the element of mutuality is wanting. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

5. THE PROVISION OF THE UNITED STATES CONSTITUTION THAT FULL FAITH AND CREDIT shall be given to the judicial proceedings of other states does not make the judgments

of other states domestic judgments to all intents and purposes, but only gives a general validity, faith, and credit to them as evidence. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

6. A JUDGMENT RENDERED IN A FOREIGN JURISDICTION is not a cause of action which arose within the state within the meaning of a statute prohibiting actions between foreign corporations unless the cause of action arose within the state. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

7. A JUDGMENT OF A COURT OF COMPETENT JURISDICTION IS CONCLUSIVE UPON ALL OF THE PARTIES to it, as a general rule, and may not be attacked collaterally except upon grounds of fraud or mistake. (Black v. Elliott, 239.)

8. THE DOCTRINE OF RES JUDICATA IS NOT APPLIED TO ORDERS with the same strictness as to judgments. (Clopton v. Clopton, 749.)

9. RES JUDICATA.—The judgment of a court of concurrent jurisdiction directly on the point, is as a plea in bar or as evidence conclusive between the same parties on the same subject matter directly in question in another court. (Allen v. International Text-Book Co., 834.)

10. JUDGMENT—MERGER BY RECOVERY OF PART OF DAMAGES FOR A SINGLE TORT, WHEN DOES NOT TAKE PLACE.—If one suffers in his person and property from the negligence or other tortious act of another, two causes of action arise in favor of the former, and his recovery of judgment for the injuries to his property does not bar his subsequent recovery for damage to his person. (Reilly v. Sicilian Asphalt Pav. Co., 636.)

11. JUDGMENTS—SCIRE FACIAS—PARTIES.—In scire facias to revive and have execution in the name of the personal representative of a dead plaintiff in a money judgment, against the living defendant, it is not necessary to make terre tenants parties, and the issue of execution upon scire facias, keeping alive the lien of the judgment on land as to the defendant, keeps the lien alive as to terre tenants, though they are not parties thereto. (Maxwell v. Leeson, 875.)

12. JUDGMENT ON SCIRE FACIAS reviving a judgment and awarding execution for money in the name of a personal representative of a deceased plaintiff for a sum less than the original judgment, by reason of partial payments thereon, is not void as creating a new judgment, nor by reason of the variance in amount from the original judgment. (Maxwell v. Leeson, 875.)

13. JUDGMENTS — SCIRE FACIAS — DEFENSES.—In scire facias to revive a judgment, payment, release, or other matter arising after judgment, may be pleaded as a defense but not any other matter existing prior to the judgment. (Maxwell v. Leeson, 875.)

14. JUDGMENT.—THE LIEN OF A JUDGMENT UPON LAND arises from the judgment itself, independent of execution upon it, so long as the judgment is not barred by limitation. (Maxwell v. Leeson, 875.)

15. JUDGMENTS—LIEN OF—SCIRE FACIAS.—A judgment lien on land continues, notwithstanding the death of the defendant, and though execution is suspended thereby, and it may be enforced in equity without revival by scire facias, so long as the scire facias will lie to revive the judgment. (Maxwell v. Leeson, 875.)

16. JUDGMENTS.—PRIVIES IN ESTATE ARE NOT BOUND by a judgment against him from whom they derive their estate, rendered after they have derived it, merely because of such privity. (Maxwell v. Leeson, 875.)

17. JUDGMENTS NUNC PRO TUNC can be entered only when there is something in the record which furnishes a basis to amend by. (Young v. Young, 440.)

18. JUDGMENTS NUNC PRO TUNC.—An oral announcement by the court upon the conclusion of a trial as to what its decision will be, which can be proved only by parol evidence, is not a sufficient basis for a nunc pro tunc entry of judgment or decree. Nor does such oral announcement make the entry of the judgment a mere ministerial act not affecting the judicial determination of the case. (Young v. Young, 440.)

19. JUDGMENTS NUNC PRO TUNC cannot be entered upon parol evidence alone. (Young v. Young, 440.)

20. JUDGMENTS NUNC PRO TUNC AFTER DEATH OF PARTY.—Any recital made in a decree or judgment entered after the death of a party to the action cannot be self-serving to afford a basis for a nunc pro tunc entry. (Young v. Young, 440.)

21. JUDGMENTS NUNC PRO TUNC AFTER DEATH OF PARTY.—If, after the conclusion of the trial of an action for divorce, one of the parties thereto dies, and the court enters a decree nunc pro tunc with nothing in the papers on file nor in the record to look to as a basis for such entry, the decree is void. (Young v. Young, 440.)

See Interest, 2; Merger of Actions.

JUDICIAL NOTICE.

See Evidence, 9.

JUDICIAL SALES.

1. A BIDDER AT A JUDICIAL SALE ACQUIRES NO RIGHT to compel a conveyance of the property until it is knocked off to him. (Tillman v. Dunman, 28.)

2. AN OFFICER OFFERING PROPERTY AT A JUDICIAL SALE MAY WITHDRAW it before it is knocked off, except when his discretion is controlled by the order of sale. (Tillman v. Dunman, 28.)

JURIES.

1. ERROR IN IMPANELING A JURY IS IMMATERIAL, if the verdict directed by the court is the only outcome of the case legally possible. (Smith v. Peacock, 53.)

2. JURY—ERRONEOUS VERDICT.—A verdict obtained by dividing the sum of the amounts to which each juror thinks the plaintiff is entitled by the number of jurors, and increasing such amount to an even sum, where such sum is not the result of a deliberate consideration and decision of the cause upon its merits, cannot be sustained. (City of Ottawa v. Gilliland, 232.)

JURISDICTION.

1. JURISDICTION, DEFECTS WAIVED BY APPEAL.—An appeal by a party in a justice's court operates as an appearance and waives irregularities in the summons and proceedings. (Rohrbough v. United States Express Co., 849.)

2. JURISDICTION.—THE PERSONAL SERVICE OF A SUMMONS, issued under the hand of the clerk and the seal of the court,

informing the defendant that he had been sued and that he must answer within a given time, gives the court jurisdiction over such defendant. (Tootle v. Ellis, 246.)

See Venue.

JUSTICE'S COURT.

See Jurisdiction.

LABOR UNIONS.

1. COMBINATIONS BY WORKMEN NOT TO WORK WITH NONUNION MEN.—Workmen have a full and legal right to say that they will not work with certain men, and their employers must accept their dictation or go without their service. (National Protective Assn. etc. v. Cumming, 648.)

2. STRIKES TO COMPEL THE DISCHARGE OF WORKMEN. WHEN NOT UNLAWFUL.—The action of a labor union and its walking delegates in causing the discharge of certain workmen by threatening their employers with a strike is not unlawful when the object is restricted to obtaining employment for the members of such union. (National Protective Assn. etc. v. Cumming, 648.)

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—ASSIGNMENT OF LEASE.—If there is no assumption by the assignee of a lease of the obligations thereof, then, as between the lessor and his assignee, there is privity of estate only. The assignee is liable for the rent while such privity exists, and may terminate his liability by assigning the lease and going out of possession. (Springer v. De Wolf, 155.)

2. LANDLORD AND TENANT—ASSIGNEE OF LEASE, WHEN MAY NOT TERMINATE HIS LIABILITY.—If an assignment of a lease, to which the lessor assents, recites that the lessee, for a certain sum, "and in consideration of the assumption by the assignee of all the obligations and liabilities of the lessee arising out of the lease," has sold and assigned the leasehold estate to the assignee, there is privity of contract between the lessor and the assignee, which cannot be terminated by the latter by again assigning the lease and surrendering possession. (Springer v. De Wolf, 155.)

3. LANDLORD AND TENANT—FORFEITURE OF LEASE—PLACE OF PAYMENT OF RENT.—A custom of the tenant to seek the landlord and pay the rent does not relieve the latter from the necessity of formal and legal demand for the payment of rent, made upon the leased land, if he seeks to make its nonpayment the basis for forfeiture of a lease, not stipulating any place where rent shall be paid. (Rea v. Eagle Transfer Co., 809.)

LARCENY.

1. LARCENY.—IF THE POSSESSION OF PROPERTY IS FRAUDULENTLY OBTAINED, with the intent on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny. (People v. Miller, 546.)

2. LARCENY.—WHERE A PERSON OBTAINS POSSESSION OF MONEY BY A FRAUDULENT DEVICE, promissory in character, with the intent at the time of appropriating the money to his own use, the owner merely parting with the custody for a special purpose, the offense is larceny. (People v. Miller, 546.)

3. LARCENY.—AN INSTRUCTION THAT THE DEFENDANT would be guilty of larceny if he obtained money by false pretenses as a part of a device or scheme, trick or artifice, intending to appropriate it to his own use, is correct. (People v. Miller, 546.)

4. LARCENY—ERROR WITHOUT PREJUDICE.—A REFUSAL TO CHARGE that to convict the defendant of larceny he must at the time he received the money have formed an intent to steal it, and charging that such intent might be formed any time before a certain date, is not prejudicial error, where the evidence permits but one inference, which is that the defendant intended to appropriate the money at the time he received it. (People v. Miller, 546.)

5. THE OFFENSE OF LARCENY AT COMMON LAW is established by proof that the defendant obtained possession of the property by some trick, fraudulent device or artifice, animo furandi, with the intention of subsequently appropriating it to his own use. (People v. Miller, 546.)

6. INDICTMENT FOR LARCENY.—UNDER THE NEW YORK PROCEDURE, an indictment in the common-law form charging larceny is still good. (People v. Miller, 546.)

LEASE.

See Landlord and Tenant.

LICENSE.

See Municipal Corporation, 1.

LIMITATIONS.

1. THE STATUTE OF LIMITATIONS MAY BE CHANGED, provided a reasonable time is allowed within which actions may be brought. (Power v. Kitching, 691.)

2. LIMITATIONS—REPLEVIN BOND.—BRINGING A SUIT for discovery to enforce a replevin bond does not stop the running of the Kentucky statute of limitations against the surety. (Louis Snider's Sons Co. v. Armendt, 306.)

See Adverse Possession; Executors and Administrators, 3; Homestead; Trusts, 2.

MANDAMUS.

See Corporations, 8.

MARRIAGE AND DIVORCE.

1. DIVORCE.—A PHYSICAL EXAMINATION was allowed at common law, in the ascertainment of the physical condition of litigants in divorce actions. (City of Ottawa v. Gilliland, 282.)

2. DIVORCE—ALIMONY—DISCHARGE IN BANKRUPTCY.—Alimony is not a debt due from husband to wife, which may be

discharged by an order in bankruptcy, whether the alimony accrues before or after the bankruptcy proceeding. (Welty v. Welty, 208.)

3. DIVORCE—ENFORCEMENT OF DECREE FOR ALIMONY.—A court of chancery has power to enforce a decree for alimony by attachment for contempt, even after the expiration of the term at which the original decree for divorce and alimony was entered. (Welty v. Welty, 208.)

4. DIVORCE—ALIMONY, WHEN NOT ORDINARY MONEY JUDGMENT.—A decree of divorce providing that defendant should pay to complainant a certain sum on the first of each month, to continue until a designated sum is paid, "said sum to be in lieu of, and in full for, alimony, and in full for all other claims," is a decree for alimony proper, and not an ordinary money decree. (Welty v. Welty, 208.)

5. DIVORCE—ESTATE BY CURTESY.—If a husband, who is tenant by the curtesy initiate, obtains a divorce for the fault of his wife, he thereby defeats his right of curtesy in her property. (Doyle v. Rowling, 416.)

6. DIVORCE—SECOND MOTION ON SAME QUESTION.—The hearing of an order to show cause why a decree of divorce should not be vacated is not a bar to a motion, supported by additional evidence, to show cause why the vacating order should not be set aside, though the same ultimate question is presented at both hearings. (Clopton v. Clopton, 749.)

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—VICE-PRINCIPAL.—If a master intrusts the performance of a duty due to his servant to another servant or agent, the latter occupies the place of the master as respects such performance, and the negligence of such servant or agent in performing the duty is the negligence of the master. (Chicago etc. R. R. Co. v. Eaton, 161.)

2. MASTER AND SERVANT—PROMISE TO REPAIR—ASSUMPTION OF RISKS.—If a servant has protested or objected to proceed with the work on account of the danger, and has a right to abandon the service because it is dangerous, but refrains from doing so because of assurances by the master that the danger shall be removed, such assurances remove all ground for holding that the servant, by continuing in the employment, engages to assume the risks. It is not essential that a direct threat be made by the servant to quit work, unless the repairs are made or the danger is removed, but only that he protest or object to proceed with the work on account of the danger, and that such objection is overcome by the promise to remove it. (Yerkes v. Northern Pac. Ry. Co., 961.)

3. EVIDENCE.—A person receiving an injury caused by a defective appliance may testify that he continued in the employment in reliance upon a promise to repair, but not as to what he would have done, had the promise not been made. (Yerkes v. Northern Pac. Ry. Co., 961.)

4. MASTER AND SERVANT—RISKS ASSUMED.—An employé assumes not only the risks arising from the negligence of his fellow-servants, but also those arising out of the negligence of his master, if he accepts, or continues in, the service after knowledge of such negligence. (Sanderson v. Panther Lumber Co., 841.)

5. MASTER AND SERVANT—FELLOW-SERVANTS.—An employé traveling over his master's railroad on the business of the latter and at his instance and request, without paying fare, is a fellow-servant with the employés of the same master operating the train, and not a passenger, and as such accepts the risks growing out of the condition and nature of the train and track known to him, and the negligence of his fellow-servants engaged in operating the train. (Sanderson v. Panther Lumber Co., 841.)

6. RES JUDICATA—WRONGFUL DISCHARGE.—If a servant employed for a certain period at a fixed salary per week is discharged during the term, and afterward recovers judgment for several installments of salary, such judgment is conclusive of the wrongfulness of his discharge, in an action brought by him after the expiration of the term to recover the balance of salary due, and confines the defense to proof of payment, release, or facts in mitigation of damages. (Allen v. International Text-Book Co., 834.)

See Railroads.

MEDICINE.

See Physicians and Surgeons.

MERGER OF ACTIONS.

1. MERGER OF CAUSES OF ACTION.—UNDER THE CODE PROCEDURE, all of the rights of litigants, both legal and equitable, so far as they are consistent with one another and affect the same parties, can be tried in one action and merged in a single judgment. (Hahl v. Sugo, 539.)

2. MERGER OF CAUSES OF ACTION.—IN AN ACTION TO RECOVER REAL PROPERTY, A NAKED LEGAL JUDGMENT establishing title and the right to possession, but which is unenforceable by execution, is a bar to a subsequent suit praying for equitable relief, since this might have been secured in the first action. (Hahl v. Sugo, 539.)

MINES AND MINING.

1. MINES AND MINING—PREPARATION OF COAL FOR MARKET—CARE REQUIRED.—A coal company in preparing its coal for market by means of an artificial breaker must exercise due care in protecting the property of adjoining owners or others, by controlling, as far as possible, through the most effective known means, the dust generated in breaking and separating the coal. If the company exercises such care, it is not liable for the injury inflicted by escaping dust. (Harvey v. Susquehanna Coal Co., 800.)

2. MINES AND MINING—ESCAPE OF COAL DUST—EVIDENCE.—A witness who has actually examined a coal-breaker and premises, and inspected the means employed to prevent the escape of coal dust, may testify to the existing conditions in an action to recover damages for injury arising from the alleged negligent escape of such coal dust. (Harvey v. Susquehanna Coal Co., 800.)

3. MINES AND MINING—NEGLIGENT ESCAPE OF COAL DUST—ERRONEOUS INSTRUCTIONS.—In an action to recover for injury to property caused by the negligent escape of coal dust, it is error to instruct the jury that the defendant is liable, if by any other device than the one employed he could have prevented the injury, as such instruction authorizes the jury to find that some

other device could have been adopted, and gives it a license to invent one, and to find defendant negligent in not having himself invented and used one like it, while his duty was only to use the most effective and approved appliances known to control the escape of dust. (Harvey v. Susquehanna Coal Co., 800.)

See Nuisances.

MINORS.

See Infants.

MISDEMEANORS.

See Criminal Law.

MONOPOLIES.

See Combinations in Business.

MORTGAGES.

1. A MORTGAGE LIVES AS LONG AS THE NOTE it was given to secure. (Perry v. Horack, 225.)

2. MORTGAGES.—RIGHT OF A SUBSEQUENT PURCHASER FROM THE MORTGAGOR, not made a party to foreclosure of the mortgage, to redeem is unaffected by the decree, but the legal title to the mortgaged premises is sold at the sale and passes by the master's deed to the purchaser. (Alsup v. Stewart, 169.)

3. A MORTGAGEE OF LAND SOLD FOR TAXES may, as claimant in a trustee process, enforce his equitable lien upon the surplus of the sale in the hands of the city. He is entitled to so much of the fund as his mortgage covers, and the plaintiff in the trustee process, a creditor of the mortgagor, is entitled to the balance. (Cummins v. Christie, 357.)

4. ASSIGNMENT OF MORTGAGE WITHOUT THE STATE—PROOF OF.—An assignment of a mortgage, executed and acknowledged in another state before a notary, is admissible in evidence in this state, without having attached thereto a certificate of some officer of higher rank to the official character and signature of the notary. (Grandin v. Emmons, 684.)

5. FORECLOSURE BY ADVERTISEMENT.—A SUBSTANTIAL COMPLIANCE with the statute regulating what a notice of foreclosure by advertisement must contain is sufficient. (McCardia v. Billings, 729.)

6. MORTGAGE FORECLOSURE—MISTAKE IN DATE.—The fact that the notice of a foreclosure sale, and all papers subsequently executed by the sheriff in respect thereto, give the date of the mortgage incorrectly, does not render the foreclosure void. (McCardia v. Billings, 729.)

7. POWER OF SALE—DEATH OF MORTGAGOR.—A power of sale in a mortgage is a power coupled with an interest, and is not suspended or terminated by the death of the mortgagor. A foreclosure thereunder, by advertisement, is effectual against his heirs. (Grandin v. Emmons, 684.)

8. A NOTICE OF MORTGAGE FORECLOSURE PUBLISHED once each week for six successive weeks before the sale is a suffi-

cient compliance with the statutes of North Dakota. (Grandin v. Emmons, 664.)

See Adverse Possession; Chattel Mortgages; Homestead; Insurance, 1.

MOTIONS.

1. MOTIONS.—THE REMEDY BY APPEAL AND THAT BY MOTION to vacate an order are alternative. (Clopton v. Clopton, 749.)

2. THE FACT OF HEARING A MOTION A SECOND TIME IS PROOF that the court has given leave to present the matter anew. (Clopton v. Clopton, 749.)

3. THE HEARING OF A NEW MOTION IS DISCRETIONARY with the court, and leave must first be obtained, when made upon the same state of facts as those presented on a previous motion. (Clopton v. Clopton, 749.)

4. A NEW MOTION FOR THE SAME RELIEF IS A MATTER OF RIGHT and may be made without leave of court, when made upon a new state of facts. (Clopton v. Clopton, 749.)

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION—LICENSE TO CONTRACTORS.—A municipal ordinance requiring those engaged in contracting for public, municipal, railroad, or bridge work to pay a license fee is unconstitutional. (Figg v. Thompson, 316.)

2. PROSTITUTES.—A MUNICIPAL ORDINANCE PROHIBITING PROSTITUTES from being on the streets between 7 o'clock P. M. and 4 o'clock A. M. following, except in instances of reasonable necessity, to be shown by the party charged, is a valid exercise of the police power. (Dunn v. Commonwealth, 344.)

3. ASSESSMENTS, SPECIAL—ESTOPPEL AGAINST PROPERTY OWNER.—A property owner cannot stand by knowing of facts justifying the repudiation of a contract for a special assessment improvement, until he has secured the benefit of the work, and materials of the contractor, and then ask to be relieved of all liability to pay therefor. (Givins v. People, 143.)

4. PUBLIC WORK—REJECTION OF BID.—A bid for a public contract under a special assessment ordinance, though it be that of the lowest responsible bidder, may be rejected if it results from a combination among the bidders, or from the act of the successful bidder in stifling competition to increase the contract price. (Givins v. People, 143.)

5. MUNICIPAL CORPORATIONS—PUBLIC STREETS—NOTICE OF UNSAFE CONDITION.—When a street is being constructed, one who drives thereon between wooden horses bearing the sign, "No passing through," which have been placed across the way or are temporarily standing lengthwise at the side of the road in such a position as plainly to indicate that it is not open to travel, does so at his own risk. (Butman v. City of Newton, 349.)

6. MUNICIPAL CORPORATIONS—PUBLIC STREETS—NEGLIGENCE IN CONSTRUCTING.—If a city, in place of leaving its ways to be constructed in accordance with the statutes, leaves their construction to its own superintendent of streets, acting under the direction of a joint committee of its aldermen and common council, it makes the superintendent its agent, and is liable for the negli-

gence of workmen acting under him. (Butman v. City of Newton, 349.)

7. MUNICIPAL CORPORATIONS—PUBLIC STREETS—NEGLIGENCE IN REPAIRING.—If a town, in place of leaving the repair of its ways to the public officers designated by statute, undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence. (Butman v. City of Newton, 349.)

8. A CITY IS UNDER AN ABSOLUTE DUTY TO KEEP ITS STREETS IN SAFE CONDITION FOR PUBLIC TRAVEL, and this obligation cannot be evaded by letting the work of excavating in a public street to an independent contractor. (Deming v. Terminal Ry., 521.)

9. MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTOR.—A city which has let the work of excavating in a public street to an independent contractor is not liable for injuries occasioned by the negligence of the contractor's employés. (Deming v. Terminal Ry., 521.)

10. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—FORBIDDING CONTRACTS—RATIFICATION. A contract for the building of a schoolhouse, by which the school district incurs an indebtedness in excess of the constitutional limit, is ratified and validated up to such limit by a vote of the district to borrow and raise funds by taxation for the erection of the schoolhouse sufficient to cover the obligation incurred. (McGillivray v. Joint School Dist., 969.)

11. MUNICIPAL CORPORATIONS—NOTICE OF LIMITS OF POWER.—One who deals with the officers of a public corporation must take notice of the limits placed by law upon the powers of those agents of the taxpayers, and if he becomes an innocent party to an attempt to impose upon them forbidden burdens, he must necessarily fail. (McGillivray v. Joint School Dist., 969.)

12. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—VALIDITY OF CONTRACT.—A contract made by a municipal corporation by which it incurs an indebtedness in excess of the constitutional limit is, after it is performed, valid and enforceable up to the constitutional limit, but invalid as to the excess, whether it is severable or not. (McGillivray v. Joint School Dist., 969.)

13. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—QUANTUM MERUIT.—If a contract for the purchase of material for a schoolhouse increases the indebtedness of the school district beyond the constitutional limit it is void; and the fact that the district has had the benefit of such material does not render it liable on an implied contract to pay quantum meruit therefor. (McGillivray v. Joint School Dist., 969.)

See Constitutional Law, 16-21.

MURDER.

See Homicide.

NEGLIGENCE.

1. NEGLIGENCE—PLEADING. — GROSS NEGLIGENCE against a railway company may be proved under an allegation of negligent, willful, and reckless misconduct on its part. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

2. NEGLIGENCE—PUBLIC STREETS.—IT MAY BE NEGLIGENCE FOR WORKMEN constructing a street to dump a load of stone on the platform of a stone-crusher and let off steam just as a horse, which is being driven along a roadway twenty-five feet away in plain sight, is opposite. (Butman v. City of Newton, 349.)

3. NEGLIGENCE—INTERVENING CRIME OF THIRD PERSON.—If it appears on the face of the petition in an action for damages that there intervened, as a direct cause, between the negligence of the defendant and the damage to the plaintiff, the independent criminal act of a third person, a demurrer to the petition should be sustained. (Andrews & Co. v. Kinsel, 25.)

4. NEGLIGENCE—PROXIMATE CAUSE.—To enable one to recover for damages from the negligent conduct of another, it must appear that the negligence of the defendant was the proximate cause of the injury sustained. (Andrews & Co. v. Kinsel, 25.)

5. NEGLIGENCE—OMISSION OF DUTY.—If an injury is done by the omission of some duty which the defendant is under obligation to see performed, the omission to perform fixes the liability, and the relation between the parties is immaterial. (Salisbury v. Erie R. R. Co., 480.)

6. NEGLIGENCE—SUDDEN PERIL—EFFORT TO ESCAPE FROM—DAMAGES.—If a person, by negligence, puts another under a reasonable apprehension of personal physical injury, and such other, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for such injury, and the mental disorder naturally incident to its occurrence. (Tuttle v. Atlantic City R. R. Co., 491.)

7. NEGLIGENCE—INJURY IN EFFORT TO ESCAPE FROM SUDDEN PERIL.—If a person, seeing a car which has been negligently derailed coming across the street at full speed toward where he is standing, and becoming frightened runs for safety and falls, receiving an injury, he is entitled to recover from the owner of the car therefor. (Tuttle v. Atlantic City R. R. Co., 491.)

8. NEGLIGENCE—LIABILITY TO INFANT TRESPASSER.—One who, in the operation of his business upon his own land, necessarily uses a cable and pulleys, owes no duty to a trespassing child, and is not liable for injuries to it caused by its being caught between such cable and pulleys. (Uthermohlen v. Bogg's Run Co., 884.)

9. NEGLIGENCE—LIABILITY TO TRESPASSERS, INFANT OR ADULT.—In the absence of wanton or willful negligence the owner of private grounds is under no obligation to keep them in safe condition for the benefit of trespassers, idlers, intruders, bare licensees, or others, whether infants or adults, who come upon them not by invitation, express or implied, but for their own purposes, to gratify their curiosity, or for pleasure. (Uthermohlen v. Bogg's Run Co., 884.)

10. NEGLIGENCE—TEST OF.—FAILURE TO DO SOME PARTICULAR THING which might have prevented an accident, and which is brought to the attention of the party charged with carelessness for the first time only after the accident has happened, is not the test of negligence. (Kilbride v. Carbon Dioxide etc. Co., 829.)

11. NEGLIGENCE.—THE UNBENDING TEST of negligence in methods, machinery, and appliances, is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. (Kilbride v. Carbon Dioxide etc. Co., 829.)

12. NEGLIGENCE IS NOT COMMITTED simply because a particular accident might have been prevented by some special device or precaution not used and not in common use. (Kilbride v. Carbon Dioxide etc. Co., 829.)

13. NEGLIGENCE—FAILURE TO ADOPT PARTICULAR APPLIANCE OR TEST.—In the absence of proof against a defendant charged with negligence that he knew that appliances used by him were defective, or that they were in fact defective, or that he deviated from any standard of care observed by those engaged in the same business, or of his failure to test the safety of his appliances as others in this country tested theirs, the mere fact that he has not adopted and used a particular method of testing in use in a foreign country but never before heard of in this, does not constitute negligence. (Kilbride v. Carbon Dioxide etc. Co., 829.)

14. NEGLIGENCE—PRIVITY OF CONTRACT.—If the duty is cast upon a person to so act that he does not harm others, independent of a contract, he is liable to third persons, even though executing a contract made with a particular person, if he harms others by negligence. (Peters v. Johnson, Jackson & Co., 909.)

15. NEGLIGENCE.—ORDINARY OR DUE CARE is to be tested by the surrounding circumstances, and no definition is complete or correct which does not embody that element. Such care is the care ordinarily exercised by the great mass of mankind under the same or similar circumstances, and the omission of the last qualification in an instruction is error. (Yerkes v. Northern Pac. Ry. Co., 961.)

16. NEGLIGENCE, CONTRIBUTORY—DEFECTIVE APPLIANCES—PROMISE TO REPAIR.—A person is not guilty of contributory negligence in continuing to work, even temporarily, with a known defective appliance, after a promise to repair, if an ordinarily prudent person, under like circumstances, might reasonably believe and expect that by the exercise of some extra care and precaution he could avoid and avert the threatened peril. (Yerkes v. Northern Pac. Ry. Co., 961.)

17. NEGLIGENCE—WHEN QUESTION OF FACT.—If the defendant's negligence is shown but there is doubt as to the contributory negligence of the plaintiff the question of his negligence should be submitted to the jury. (McCracken v. Consolidated Traction Co., 814.)

18. NEGLIGENCE—GAS COMPANIES—QUESTION FOR JURY.—If plaintiff shows a series of acts from which the inference of negligence on the part of a gas company arises, sufficient to carry the case to the jury, that inference remains until overcome by countervailing proof, and whether it is so overcome is a question of fact to be determined by the jury and not by the court. (Heh v. Consolidated Gas Co., 819.)

See Death; Gas Companies; Railroads.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—TIME OF NOTICE OF DISHONOR.—The holder of commercial paper is not required to give notice of dishonor on the day the paper is protested, but may give notice on the first business day thereafter. (M. V. Monarch Co. v. Farmers' etc. Bank, 310.)

2. NEGOTIABLE INSTRUMENTS.—AN INDORSER CANNOT ESCAPE LIABILITY on the ground that a prior indorsement by a corporation is ultra vires and not binding. (M. V. Monarch Co. v. Farmers' etc. Bank, 310.)

3. NEGOTIABLE INSTRUMENTS.—THE MANNER OF GIVING NOTICE OF THE PROTEST of commercial paper, whether through the mail or by personal delivery from the notary, is not important. Notice in time is all that is required. (M. V. Monarch Co. v. Farmers' etc. Bank, 310.)

4. NEGOTIABLE INSTRUMENTS.—THE PURCHASER OF A NEGOTIABLE INSTRUMENT IS NOT AFFECTED BY CONSTRUCTIVE NOTICE, unless it appears that the circumstances suggested an inquiry at the time of the purchase, which, if fairly pursued, would have resulted in the discovery of the defect in the title. There must be in the nature of the case such a connection between the facts appearing and the further facts to be discovered that the former may be said to furnish a reasonable and natural clew to the latter. (Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 640.)

5. NEGOTIABLE BONDS.—NOTICE TO A PURCHASER OR PLEDGEE OF THE WANT OF TITLE of the holder of negotiable municipal bonds is not created by the facts that the name of the payee is in blank, that the bonds declare that they were registered, that he borrowed money on them as trustee, and that the corners were badly burned. (Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 640.)

6. NEGOTIABLE INSTRUMENTS—REGISTERED BONDS.—The fact that a statute authorizing the issue of municipal bonds provides that they shall be registered in the city clerk's office, in a book kept for that purpose, does not affect their negotiability. (Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 640.)

7. NEGOTIABLE INSTRUMENTS, PURCHASER OF, DUTY OF INQUIRY BY.—If an instrument is transferable by indorsement and delivery or by delivery alone, a purchaser taking in good faith and for value need not investigate the bona fides or the title of the previous holder. (Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 640.)

8. NEGOTIABLE INSTRUMENTS ACQUIRED FROM A THIEF.—If a negotiable instrument is issued with the payee's name in blank, and is afterward stolen, one who acquires it for value and in good faith from the thief is thereby invested with authority to fill in such blank to the same extent and with like effect as if it were acquired from the legal owner. (Manhattan Sav. Inst. v. New York National Exch. Bank, 640.)

9. NEGOTIABLE INSTRUMENTS.—THE INTENTIONAL FAILURE TO INSERT THE NAME OF THE PAYEE in a negotiable instrument invests any bona fide holder with authority to fill the blank with the name of some person, and until it is so filled, the bond is payable to bearer. (Manhattan Sav. Inst. v. New York National Exch. Bank, 640.)

10. NEGOTIABLE INSTRUMENTS.—THE PRESUMPTION IS THAT A PERSON IN POSSESSION of a negotiable instrument is a holder for value. (Manhattan Sav. Inst. v. New York National Exch. Bank, 640.)

11. NEGOTIABLE INSTRUMENTS.—THE FAILURE TO INSERT IN A BOND THE NAME OF THE PAYEE does not affect its negotiability. (Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 640.)

See Corporations, 14; Payment.

NEGROES.

See Constitutional Law, 14.

NEW TRIAL.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — A new trial cannot be awarded on the ground of newly discovered evidence, which is cumulative or by way of impeachment merely, and in its nature is not conclusive. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

See Appeal and Error.

NOTARY'S SEAL.

NOTARY'S SEAL—HOW PROVED.—Courts take judicial notice of the seal of a notary, and it proves itself prima facie by its appearance upon a certificate. (Grandin v. Emmons, 684.)

NUISANCES.

1. NUISANCE.—A PRIVATE PERSON WHO IS NOT SPECIALLY INJURED BY A COMMON NUISANCE in any other manner or degree than all other members of the community cannot maintain an action in his own name to abate the nuisance. (State v. Stark, 251.)

2. NUISANCES—ABATEMENT.—ALTHOUGH BY STATUTE ALL PLACES WHERE INTOXICATING LIQUORS are sold for drinking as a beverage are declared to be common nuisances, yet this does not authorize or justify private persons in breaking into such places and destroying the liquors and the vessels in which they are kept. (State v. Stark, 251.)

3. NUISANCE FROM MINING.—MEASURE OF DAMAGES to property caused by the negligent escape of coal dust from a breaker is the cost of restoring the premises to their condition before they were injured, unless such cost equals or exceeds their value, in which event the value of the premises is the measure of damage, and in either case the actual loss in rentals due to the injury of the premises should be added. (Harvey v. Susquehanna Coal Co., 800.)

OSTEOPATHY.

See Physicians and Surgeons.

PARENT AND CHILD.

1. PARENT AND CHILD—CONTRACT FOR CUSTODY OF CHILD.—A parent who contracts to commit the custody and maintenance of his child to a third person is bound by such contract after it is acted upon, unless the welfare of the child demands that the contract be disregarded. (Fletcher v. Hickman, 862.)

2. PARENT AND CHILD — INVESTMENT OF CHILD'S FUNDS—TRUSTS.—A father receiving money in trust for his children and investing it in land for their benefit, taking the title in his own name, thereby creates a trust in their favor. (Crumrine v. Crumrine, 859.)

3. A FATHER HAS NO RIGHT OF ACTION FOR INJURIES TO HIS MINOR CHILD, if they do not destroy or impair the ability of the child to render services to him. (Hurst v. Goodwin, 43.)

See Infants.

PARTITION.

1. PARTITION.—EVERY COTENANT IS ENTITLED to a partition as a matter of right. (O'Brien v. Mahoney, 371.)

2. PARTITION.—ONE OF TWO HEIRS IS ENTITLED to a partition of the estate of their ancestor while it is in course of settlement in the probate court. (O'Brien v. Mahoney, 371.)

3. COTENANCY — PARTITION OF PROPERTY.— WHERE PROPERTY IS ALIKE IN QUALITY AND VALUE and divisible by weight, tale or measure, one cotenant may take out his share without the assent of his cotenant, and may bring an action for the value of his share against a cotenant who, being in possession of the property, refuses to divide it. (Gates v. Bowers, 530.)

4. COTENANCY IN ANIMALS — DIVISION.—Where animals held in common are substantially alike in value, or their value depends solely on their weight, so that a division can readily be made, one cotenant may enforce a division against his cotenant or sue him for a refusal to make such division. (Gates v. Bowers, 530.)

PARTNERSHIP.

1. PARTNER—LIMITING LIABILITY OF.—A person selling goods to one partner on credit cannot bind the other partner after notice that he will not be bound. And this, though the goods come to the firm and are used by it. (Dawson, Blackmore & Co. v. Elrod, 320.)

2. PARTNERS HAVE AN EQUITY IN THE PARTNERSHIP PROPERTY TO COMPEL ITS APPROPRIATION TO THE PAYMENT OF PARTNERSHIP DEBTS, as against the debts of individual members of the firm. (Kincaid v. National Wall-paper Co., 243.)

3. PARTNERSHIP CREDITORS HAVE NO LIEN upon the partnership property. (Kincaid v. National Wall-paper Co., 243.)

4. PARTNERSHIP CREDITORS—INDIVIDUAL DEBTS.—The members of an insolvent partnership, all the partners consenting, may, in good faith, appropriate their own interests in the partnership property to the payment of their individual debts in preference to those of the partnership. (Kincaid v. National Wall-paper Co., 243.)

See Chattel Mortgages, 8.

PAYMENT.

PAYMENT.—THE RULE THAT A PROMISSORY NOTE given by a debtor to his creditor is presumed to be payment has little or no application to a lien creditor who tenders the note to the maker in court. (Brewer Lumber Co. v. Boston etc. R. R. Co., 375.)

See Assignment, 5.

PHYSICAL EXAMINATIONS.

See Marriage and Divorce, 1; Trial, 7-9.

PHYSICIANS AND SURGEONS.

1. MEDICINE — PRACTICE OF — WHAT IS.—A person who gives treatment, after a diagnosis, by rubbing or kneading the body

to free the nerve force, as in osteopathic treatment, practices medicine, within the meaning of a statute providing that any person shall be regarded as practicing medicine who "shall treat, or profess to treat, operate on, or prescribe for any physical ailment, or physical deformity, or injury, of another," although such practitioner does not use drugs, medicine, or instruments, nor does he, by means of such treatment, treat the sick by "mental or spiritual means," alone. (People v. Gordon, 165.)

2. CONSTITUTIONAL LAW—PRACTICE OF MEDICINE.—A statute providing that any person shall be regarded as practicing medicine who "shall treat, or profess to treat, operate on, or prescribe for, any physical ailment or physical injury or deformity of another," is not unconstitutional as conferring special privileges upon special classes. (People v. Gordon, 165.)

PLEADING.

PLEADINGS—BILL OF PARTICULARS.—The cause of action or ground of defense must be stated in the pleadings and not in a bill of particulars; but a bill of particulars may be demanded and allowed in a proper case to amplify the pleading, so as to more minutely specify the ground of defense and prevent surprise at the trial. (West Virginia Transportation Co. v. Standard Oil Co., 895.)

See Actions.

POISON.

See Druggists.

POLICE POWER.

See Constitutional Law.

POOLING.

See Corporations, 12.

POSSESSION OF STOLEN GOODS.

See Burglary; Larceny.

POWER OF ATTORNEY.

See Agency, 18, 19; Corporations, 11.

PRACTICE.

See Actions.

PRESENCE OF ACCUSED.

See Constitutional Law, 23, 24; Criminal Law, 1.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PROCESS.

See Jurisdiction.

PROMOTERS.,

See Corporations, 15.

PROSTITUTES.

See Municipal Corporations.

PUBLIC WORK.

See Municipal Corporations, 4.

PURE FOOD LAWS.

See Constitutional Law, 7-12.

RAILROADS.

1. RAILROADS—DUTY TO SERVANTS—DELEGATION OF DUTY.—It is the duty of a railroad company to furnish its engineer a reasonably safe track upon which to operate his engine, and it cannot delegate that duty, nor the duty to notify such engineer that a rail has been removed from the track at a certain point on his run. (Chicago etc. R. R. Co. v. Eaton, 161.)

2. RAILROADS—RULES—RIGHT OF EMPLOYÉ TO RELY UPON OBSERVANCE OF.—A railroad engineer has a right to rely upon the observance by a track gang of the company's rule that flagmen and torpedoes will be placed where a rail has been removed from the track, whether he has received notice to look out for such track gang at a certain point or not. (Chicago etc. R. R. Co. v. Eaton, 161.)

3. EVIDENCE.—THE ADOPTION BY A RAILROAD COMPANY OF A RULE requiring the placing of flagmen and torpedoes where a rail is taken from the track is an admission by the company that ordinary care required such course of conduct. (Chicago etc. R. R. Co. v. Eaton, 161.)

4. RAILROADS—NEGLIGENCE OF FOREMAN.—If a railroad company places a push car in the hands of its foreman, to be used upon its track, it is the duty of the foreman to use it with reasonable care to prevent injury to anyone lawfully upon the track and to keep it under his own supervision until it is returned to the company. For the performance of such duty by the foreman the railroad company is bound, and the failure of the foreman to perform is the failure of the company. (Salisbury v. Erie R. R. Co., 480.)

5. RAILROADS—NEGLECT OF DUTY.—Railroad companies may become liable for injury caused by neglect of duty resting upon them, independent of the relation of master and servant. (Salisbury v. Erie R. R. Co., 480.)

6. INDEPENDENT CONTRACTOR—INJURY IN HIGHWAY. A RAILROAD COMPANY WHICH, BY STATUTE, HAS ABSOLUTE DOMINION OVER A HIGHWAY for the purpose of carrying it across a railroad track is liable for injuries to passersby upon the highway, due to a failure to properly guard the excava-

tions therein, although the construction of the road has been let to an independent contractor. (Deming v. Terminal Ry., 521.)

7. RAILROADS—LIABILITY FOR NEGLIGENCE OF FOREMAN.—If a railroad company places a push car in the hands of its foreman, to be used upon its road for the purpose of removing waste railroad ties and the foreman loans the car to one of the laborers under him to take away some of the ties for his own use after his day's work is done, the company is liable to a third person who is injured, while lawfully upon the track, by the negligence of the laborer while thus using the car. (Salisbury v. Erie R. R. Co., 480.)

8. NEGLIGENCE—BICYCLISTS—STREET RAILWAYS.—It is the duty of a bicycle rider about to cross a street railway track to look and listen as he approaches, and his failure to do so is negligence per se. This is an unbending rule, to be observed at all times, and under all circumstances. (McCracken v. Consolidated Traction Co., 814.)

9. NEGLIGENCE—RAILROADS—RIGHT TO TRACK.—The dominant right to a railroad track is in the company owning it, and must be conceded and deferred to by all of the public who have a right to cross it, and when about to cross they must use ordinary prudence to ascertain whether the owner is about to use it. (McCracken v. Consolidated Traction Co., 814.)

10. NEGLIGENCE, CONTRIBUTORY—BICYCLISTS—STREET RAILWAYS.—A bicycle rider struck by a car of a street railroad as he attempts to cross the track cannot relieve himself of contributory negligence by showing the unlawful rate of speed of the car, if it was within his view just before he reached the track, and it is shown that, whether he looked or not, he failed to stop, and took the chance of crossing ahead of it. (McCracken v. Consolidated Traction Co., 814.)

11. STREET RAILWAYS—POSITION OF PASSENGER—NEGLIGENCE.—If a passenger rides on the side steps of a street-car with the knowledge and consent of the conductor and from necessity for want of room to sit or stand inside, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers; but if he rides in such position when it is reasonably practicable for him to sit or stand inside the car, he takes upon himself the risk of his position from any cause. (Woodroffe v. Roxborough etc. Ry. Co., 827.)

12. STREET RAILWAYS—NEGLIGENCE OF PASSENGER.—A passenger who stands on the platform or side steps of an electric street-car, when there is either a vacant seat or room to stand inside the car, assumes not only the ordinary risks of the road, but also all risks incident to his position, unless he shows some valid reason or excuse for his position at the time of the accident. (Woodroffe v. Roxborough etc. Ry. Co., 827.)

13. RAILROADS—RECORD OF EMPLOYÉ.—A railroad company has a right to keep a record of the causes for which it discharges an employé, but a false entry thereon must be regarded as intended to injure him, and therefore a malicious act. (Hundley v. Louisville etc. Ry. Co., 298.)

14. RAILROAD EMPLOYÉ—BLACKLISTING.—In an action by a railroad employé against the company for making a false entry upon its record of the reason for his discharge, and entering into a combination with other railroad companies by which its discharged employés shall not be employed by them, the petition is demurrable if it does not aver that the employé has sought and

been refused employment by reason of the alleged wrongful acts. (Hundley v. Louisville etc. Ry. Co., 298.)

See Carriers.

RAPE.

RAPE—EVIDENCE OF UNCHASTITY.—In a prosecution for rape, evidence of the previous unchaste character of the woman is admissible both to discredit her as a witness and to disprove that the intercourse was forcible and against her consent. (Seals v. State, 88.)

RENT.

See Landlord and Tenant.

REPEAL OF STATUTES.

See Statutes.

REPLEVIN.

See Cotenancy; Limitation of Actions, 2.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgments; Master and Servant, 6; Merger of Actions; Motions.

RESTRAINT OF TRADE.

See Contracts, 4, 5.

ROBBERY.

1. ROBBERY—WHAT IS NOT.—SNATCHING UP a revolver lying in close proximity to the owner, presenting it at him and his wife to deter their attempting to recover it or give pursuit, and carrying it away with intent to steal, is not robbery. (Jackson v. State, 60.)

2. ROBBERY.—THE MEANING OF THE PHRASE "FROM THE PERSON OF ANOTHER," embraced in the definition of robbery, is, not that the taking must be from the actual contact of the body, but if it is from under the personal protection, that will suffice. (Jackson v. State, 60.)

SALES.

1. A SALE OTHERWISE LAWFUL is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. (Graves v. Johnson, 355.)

2. DAMAGES AGAINST VENDOR.—ONE WHO SELLS PIPE to a contractor to lay in a ditch already dug, and who is notified that in the event of rain the ditch will cave in, may be liable for the cost of redigging the ditch, which, because of the nondelivery of the pipe, is washed in by a rain as apprehended. (Lonegan v. Waldo, 365.)

3. DAMAGES, MEASURE OF.—IF GOODS SOLD ARE NOT DELIVERED, the measure of damages usually is their market value at the time and place at which they should have been delivered, with interest. But when special circumstances are known to both parties, and they contract in reference thereto, the one in default may be answerable for whatever damages the other sustains as the reasonable and natural consequences of a breach under the circumstances contemplated. (Lonergan v. Waldo, 365.)

4. THE RIGHT OF STOPPAGE IN TRANSITU may be exercised, though the vendor has accepted the vendee's promissory note and receipted his bill for the goods, if he tenders the note in court to the maker's assignee in bankruptcy. The fact that the note was indorsed to a bank for collection or was indorsed by it is immaterial. (Brewer Lumber Co. v. Boston etc. R. R. Co., 375.)

5. THE RIGHT OF STOPPAGE IN TRANSITU may be exercised as to goods stored by a carrier at their journey's end and as to which the purchaser has not discharged the carrier's liens, unless the carrier has agreed with the purchaser to hold them as his bailee or agent. (Brewer Lumber Co. v. Boston etc. R. R. Co., 375.)

SCIRE FACIAS.

See Judgments, 11-15.

SEALS.

See Notary's Seal.

SELF-DEFENSE.

See Homicide.

SLANDER.

See Infants.

STATUTE OF FRAUDS.

1. THE STATUTE OF FRAUDS REFERS TO A CONTRACT which, by its terms, is not to be performed within a year, and which, from its very stipulations, is not capable of being performed within a year. (Dickey v. Dickinson, 337.)

2. STATUTE OF FRAUDS.—A CONTRACT NOT TO AGAIN ENGAGE IN PUBLISHING a newspaper in a given place is not within the statute of frauds. (Dickey v. Dickinson, 337.)

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTE.—THE PRESUMPTION IS THAT A PUBLISHED STATUTE is a true copy of the bill in the office of the Secretary of State. (Power v. Kitching, 691.)

2. STATUTE—EVIDENCE OF ENACTMENT.—An enrolled bill properly authenticated and on file with the Secretary of State must prevail as against conflicting entries in the journals of the house and Senate. (Power v. Kitching, 691.)

3. A STATUTE IS TO BE GIVEN THAT MEANING which the ordinary meaning of its language warrants. (Anglo-American Provision Co. v. Davis Provision Co., 608.)

4. STATUTES, REPEAL OF.—THAT A GENERAL STATUTE IS COUCHED IN NEGATIVE TERMS makes it more indicative of the legislative purpose to have it replace all other statutes upon the subject. (Howard v. Hulbert, 267.)

5. STATUTE—REPEAL BY IMPLICATION.—THE RULE THAT WHERE TWO STATUTES ARE, IN BOTH LANGUAGE AND MEANING, IRRECONCILABLY REPUGNANT, the provisions of the one last enacted repeal, by implication, those of the former with which they conflict, applies to a general act and a prior special act. (Howard v. Hulbert, 267.)

6. STATUTES, REPEAL OF.—THE RULE THAT A GENERAL LAW DOES NOT BY IMPLICATION REPEAL A SPECIAL ACT is only a rule of construction, and must yield when there appear in the general act reasons sufficient to lead to the conclusion that a repeal of the special act was intended. (Howard v. Hulbert, 267.)

7. REMEDIES—REPEAL OF STATUTE.—The appellate court must reverse a judgment which was correct when pronounced in the lower court, if it appears that pending the appeal a statute necessary to support such judgment has been withdrawn by absolute repeal. (Vance v. Rankin, 173.)

8. REMEDIES—REPEAL OF STATUTE.—If a statute under which it is sought to coerce a village by mandamus to pass a certain ordinance is repealed pending an appeal from the judgment, without a saving clause as to existing suits, the repeal takes away the right to have the writ enforced, and the question of such repeal may be raised whenever an attempt is made to enforce the writ. (Vance v. Rankin, 173.)

9. REMEDIES.—EFFECT OF REPEAL OF A STATUTE giving a special remedy is to obliterate it completely, and it must be considered as a law that never existed except for the purposes of those actions commenced, prosecuted, and concluded while it was an existing law. (Vance v. Rankin, 173.)

10. REMEDIES—EFFECT OF REPEAL OF STATUTE.—If a case is appealed, and, pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when the decision is rendered. (Vance v. Rankin, 173.)

11. REMEDIES—REPEAL OF STATUTES.—If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them, and if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. (Vance v. Rankin, 173.)

See Constitutional Law.

STOPPAGE IN TRANSIT.

See Sales, 4, 5.

STREET RAILWAYS.

See Railroads, 8-12.

STREETS.

See Municipal Corporations.

STRIKES.

See Labor Unions.

SUBAGENTS.

See Agency.

SURETYSHIP.

PRINCIPAL AND SURETY.—NO ACTION CAN BE MAINTAINED AGAINST A SURETY unless the liability of the principal exists at the time the action is commenced. (Pacific Elevator Co. v. Whitbeck, 229.)

TAXATION.

1. TAXATION—SITUS OF CREDITS.—An exception to the rule that the taxable situs of credits is at the domicile of the owner exists when the evidence of such indebtedness is in the hands of an agent of the owner, for the purpose of enabling the agent to transact the business of the owner, in which business the credits constitute the subject matter or stock in trade. (Matzenbaugh v. People, 134.)

2. TAXATION—SITUS OF PERSONALTY.—Notes and securities of a principal remaining in the hands of his agent in one state, to enable the latter to successfully carry on the business of the principal, are taxable in that state, although he may have established his domicile in another state. (Matzenbaugh v. People, 134.)

3. TAXATION.—PERSONAL TAXES ARE PROPERLY CHARGED AGAINST REAL ESTATE when the taxpayer has removed from the state, and the tax collector is unable to find personalty out of which such taxes may be made. (Matzenbaugh v. People, 134.)

4. AN INHERITANCE TAX IS IMPOSED ON ESTATES IN REMAINDER by the statute of New York, and the right to collect such tax is not suspended until the determination of the precedent estates. By the aid of a table of annuities the present value of the remainders is capable of ready computation. (Matter of Dows, 508.)

5. INHERITANCE TAX, WHEN MAY BE COLLECTED OUT OF PROPERTY PASSING BY THE EXERCISE OF A POWER OF APPOINTMENT.—If a testator devises property in trust for a life then in being, and provides that at the termination of that life it shall vest in the surviving children of that person and such of the issue of his deceased children as he may designate and appoint by his will, the property so passing by such appointment is subject to an inheritance tax, though at the time of the making of the will there was no transfer tax as against the descendants of the testator. (Matter of Dows, 508.)

6. CONSTITUTIONAL LAW.—AN INHERITANCE TAX IS NOT ON PROPERTY, but on the succession, and therefore a state is not, in the exercise of the power to impose an inheritance tax, limited by the provisions of the constitution requiring uniformity and equality in taxation. (Matter of Dows, 508.)

See Mortgages, 8.

TELEGRAPH COMPANIES.

CONTRACT BY TELEGRAPH—MISTAKE IN TRANSMISSION.—If a message is delivered to a telegraph company containing an offer to sell merchandise at a certain price, and the company so transmits it as to contain an offer at a less price, the sender is bound to furnish the merchandise at the latter price, and he may recover from the company the damages sustained by complying with the offer. (Western Union Tel. Co. v. Flint River Lumber Co., 36.)

THREATS.

See Homicide.

TITLE OF STATUTE.

See Constitutional Law, 1-6.

TORTS.

1. TORTS—WHEN ACTIONABLE.—A legal right must be invaded in order that an action of tort may be maintained. The mere fact that the complainant may have suffered damage of the kind recognized by law is not sufficient, as there must also be a violation of a duty recognized by law. (West Virginia Transp. Co. v. Standard Oil Co., 895.)

2. TORT—INJURY TO VOCATION.—For every injury from a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. (Hundley v. Louisville etc. R. R. Co., 298.)

3. ACTIONS.—INJURIES REMOTELY AND INDIRECTLY ATTRIBUTABLE TO AN ORIGINATING CAUSE cannot be made the subject of a legal action. (Downes v. Bennett, 256.)

TRESPASSERS.

See Negligence, 8, 9.

TRIAL.

1. TRIAL.—VERDICT in an action of trespass on the case, reading, "We, the jury, find for the defendants," under a plea of not guilty, is good. (Peters v. Johnson, Jackson & Co., 909.)

2. TRIAL—EVIDENCE, WHEN MUST GO TO JURY.—A binding instruction is proper when the evidence is not conflicting and presents the facts on which the case depends clearly and distinctly; but if the evidence is conflicting or fails to present the facts fully, so that inferences are to be drawn, or the credibility of witnesses is to be settled, the evidence must go to the jury. (Heh v. Consolidated Gas Co., 819.)

3. TRIAL—DIRECTING VERDICT.—The rule that a verdict may be directed if a different conclusion could not be reached by the jury without a capricious disregard of apparently truthful testimony that is in itself probable, and is not at variance with any proved or admitted facts, does not apply if there is a conflict of testimony, unless that on one side amounts only to a scintilla. (Heh v. Consolidated Gas Co., 819.)

4. TRIAL.—An affidavit of defense not alleging specifically and at length the nature and character of the defense relied upon is insufficient. (Pennsylvania R. R. Co. v. Midvale Steel Co., 836.)

5. CRIMINAL TRIALS—FAILURE TO TESTIFY.—The failure of the accused in a criminal trial to testify in his own behalf, or the failure of his codefendants to testify, does not raise a presumption of guilt against the person on trial. Hence, it is error to allow counsel for the prosecution to state to the jury that it is the duty of the codefendants of the accused on trial to come forward and testify as to their whereabouts at the time of the commission of the crime. (State v. Weaver, 406.)

6. CRIMINAL TRIAL—IRREGULAR ARRAIGNMENT.—If some of the evidence is introduced before the indictment is read and a plea entered, and the state's attorney afterward reads the indictment to the jury in the presence of the defendant, the irregularity is waived by his entering a plea without objection, and consenting that the testimony already given be considered without being reintroduced. (Utterback v. Commonwealth, 328.)

7. EVIDENCE OF PHYSICIANS.—IN AN ACTION FOR PERSONAL INJURIES, THE INJURED PARTY MAY CALL PHYSICIANS, to whom he may expose his person, for the purpose of using the expert testimony to assist him in the trial of his case. (City of Ottawa v. Gilliland, 232.)

8. EVIDENCE—EXHIBITION OF PERSON.—IN AN ACTION FOR PERSONAL INJURIES, THE INJURED PARTY MAY EXPOSE THE INJURED PORTION OF HIS PERSON TO THE JURY, observing the rules of decency. (City of Ottawa v. Gilliland, 232.)

9. EVIDENCE—PHYSICAL EXAMINATION.—IN ACTIONS FOR PERSONAL INJURIES, A COURT HAS POWER TO REQUIRE THE PLAINTIFF TO SUBMIT TO A PRIVATE PHYSICAL EXAMINATION by a board of physicians selected by the court, such power to be exercised with discretion, and only when necessary to a full determination of the facts. (City of Ottawa v. Gilliland, 232.)

See Instructions; Jury.

TROVER AND CONVERSION.

See Bailments, 2; Cotenancy.

TRUSTS.

See Combinations in Business.

TRUSTS AND TRUSTEES.

1. TRUSTS.—TRUSTEES ARE NEVER PRESUMED guilty of a breach of trust. (Crumrine v. Crumrine, 859.)

2. TRUSTS—STATUTE OF LIMITATIONS.—Money received in express trust and invested in land by the trustee is held under the same character of trust, to which the statute of limitations does not apply, until the death or denial of the trust by the trustee. (Crumrine v. Crumrine, 859.)

3. AN EXPRESS TRUST CANNOT BE CREATED BY PAROL in Georgia. (Smith v. Peacock, 53.)

4. TRUSTEE EX MALEFICIO.—WHERE PROPERTY IS CONVEYED UPON THE EXPRESS PROMISE of the grantee to

pay certain sums to others, the grantee having no other property, equity will interpose to declare a trust and compel payment to the beneficiaries out of the property conveyed. (Ahrens v. Jones, 620.)

5. TRUSTEE EX MALEFICIO.—WHERE A DEED IS EXECUTED FOR THE PURPOSE OF EFFECTING A DISTRIBUTION of the grantor's property, upon the express promise of the grantee to pay certain sums to others, though no express trust is created, a court of equity may interpose to prevent a wrong, and declare the grantee a trustee ex maleficio for the protection of the grantor's intended beneficiaries. (Ahrens v. Jones, 620.)

USURY.

See Building and Loan Associations.

VENUE.

A CHANGE OF VENUE IS A WRONG TO THE PUBLIC, unless the interests of justice to the defendant require it, and the prejudice on the part of a judge must clearly appear. (State v. Stark, 251.)

VERDICTS.

See Criminal Law, 4; Jury; Trial.

VICE-PRINCIPAL.

See Master and Servant.

WATERS AND WATERCOURSES.

1. WATERS—DIVERSION OF SURFACE WATER.—The diversion or altered transmission of surface water by the erection of a building is not an actionable injury, even though damage ensues. (Jessup v. Bamford Bros. Silk Mfg. Co., 502.)

2. WATERS—POLLUTION.—MEASURE OF DAMAGES for the pollution of a stream is the cost of removing the polluting substance, unless such expense exceeds the value of the entire property, in which case the value of the property is the limit of the measure of damages. There can be no recovery in excess of the value of the property for the permanent injury. (Stevenson v. Ebervale Coal Co., 805.)

3. WATERS—POLLUTION—EVIDENCE.—In an action to recover for the pollution of the waters of a stream used to operate a wool factory, declarations of the plaintiff that it was difficult to do business because of the scarcity of wool, inability to get skilled labor, and because the machinery and the plaintiff are both old, are admissible in evidence, both as tending to show the real value of the property injured and whether its impaired value was due entirely to injury caused by the defendant. (Stevenson v. Ebervale Coal Co., 805.)

4. WATERS—POLLUTION.—EVIDENCE OF THE REAL VALUE of the property injured is admissible in an action to recover for the pollution of a stream. (Stevenson v. Ebervale Coal Co., 805.)

5. WATERS—POLLUTION—EVIDENCE TO MITIGATE DAMAGES.—If a person has the right to use the waters of a stream as it naturally flows over his property, private persons polluting it

cannot urge, in mitigation of the damages caused by them, that they offered to give him a substitute for it. The right to decline arbitrarily the use of any other water offered is as absolute as the right to use the unpolluted water. (Stevenson v. Ebervale Coal Co., 805.)

6. WATERS — POLLUTION.—EVIDENCE that other causes than the alleged injury committed by the defendant contributed to the pollution of a stream and the impairment of the value of plaintiff's property, is admissible in an action to recover for the pollution of the stream. (Stevenson v. Ebervale Coal Co., 805.)

WILLS.

WILLS.—A DEVISE BECOMES INOPERATIVE IF THE TESTATOR PARTS WITH THE TITLE to the property in his lifetime, and it is not material that this parting was involuntary, as where the property was taken by condemnation proceedings, though the proceeds, or the greater part thereof, remained in the possession of the testator at the time of his decease. (Amotrono v. Downs, 671.)

WITNESSES.

1. WITNESSES—COMPETENCY OF CHILDREN.—In most cases, the decision of the trial court as to the competency of a child to testify is final, and it must be a very flagrant case of error to authorize the appellate court to reverse the judgment. (Uthermohlen v. Bogg's Run Co., 884.)

2. EVIDENCE.—EXPERTS, WHO COMPETENT TO TESTIFY TO VALUE.—Persons engaged in buying, selling, and handling racehorses, and who had seen certain racehorses injured while in the hands of a common carrier, frequently upon the racetrack and in races before their injury, and knew their speed and quality, are competent to testify to the value of such horses immediately before and subsequent to such injury. (Chicago etc. Ry. Co. v. Calumet Stock Farm, 68.)

3. EVIDENCE.—OPINIONS of witnesses as to the annual depreciation of the value of property caused by the pollution of a stream are inadmissible in evidence, especially when they are mere reckless guesses based upon no facts whatever. (Stevenson v. Ebervale Coal Co., 805.)

4. EVIDENCE—HEARSAY—CROSS-EXAMINATION.—A witness who, in contradiction of one of the defendant's witnesses, testifies concerning admissions made by the latter cannot on cross-examination be asked as to statements made to him by the defendant's lawyer. (Gates v. Bowers, 530.)

5. EVIDENCE—IMPEACHING WITNESS—DEPOSITION.—A witness who testifies as to the character of an agreement between him and one of the litigants may be contradicted by the introduction of his deposition taken in another case, in which he testifies that his agreement was of a different character. (Gates v. Bowers, 530.)

6. A WITNESS CANNOT BE DISCREDITED by showing that he was a hard debtor and had taken advantage of his creditor's pecuniary straits. (Gates v. Bowers, 530.)

7. IMPEACHMENT OF WITNESS.—In the absence of a special request, the court need not apply to testimony discrediting particular witnesses the rules of law which have been given with refer-

ence to the impeachment of witnesses, generally. (Knight v. State, 17.)

8. EVIDENCE.—RECORD OF CONVICTION of a statutory offense, punishable by fine and imprisonment only in the county jail, is not admissible in evidence for the purpose of discrediting the witness so convicted. (Matzenbaugh v. People, 134.)

9. A WITNESS SOUGHT TO BE IMPEACHED by evidence of contradictory statements cannot be supported by testimony that he made statements elsewhere in harmony with his testimony. (Knight v. State, 17.)

See Evidence.

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